

# ARTICLES

## The Private Law of Race and Sex: An Antebellum Perspective

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*In this article, Professor Adrienne D. Davis traces the interaction of race, sex, and estate law in the antebellum and postbellum South. Through a close analysis of intestate succession and testamentary transfers involving the formerly enslaved, Professor Davis uncovers the role of private law in reconciling and preserving both property rights and racial hierarchy. The article centers on a series of historical case studies involving the rights of formerly enslaved women and their children to postmortem transfers of wealth. While the law of private property generally served to reinforce racial hierarchy, these cases involved the use of property rights—specifically, testamentary freedom—to transfer wealth from whites to blacks. Furthermore, honoring the postmortem transfers in such cases could be read as moral tolerance or approval of the underlying interracial liaisons. Southern courts moved gingerly through this terrain of race, gender, and property rights, struggling to maintain racial hierarchy while reaffirming the system of private property. Through these case studies, Professor Davis illuminates more generally the nature of the antebellum sexual economy. With this historical study as an illustration, she concludes that private law may play at least as significant a role as public law in the construction, recognition, and reinforcement of racial and sexual relationships.*

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\* Professor of Law, Washington College of Law, American University. While influenced by many, this article is particularly indebted to three legal scholars who over the years have inspired me with their work and, of even more value to a junior colleague, their engagement with my own work and ideas. The brilliant histories by Judge A. Leon Higginbotham, Jr. illuminating the nexus of enslavement and sexual regulation initially stimulated my interest in this area. Through their own scholarship and almost daily engagement with this project, my colleagues James Boyle and Joan Williams offered me the twin lenses of post-modernist critical legal studies and feminist legal theory through which to view my topic. James Boyle directed my attention to the import of private law and judicial rhetoric. Joan Williams enabled me to crystallize the connections between the legal and socio-economic regulations of sexual relationships. Early versions of this article were presented at the Northeast Corridor Collective and as part of the Black Women and Work Project, sponsored by the University of Maryland at College Park and the Ford Foundation. A later version was presented at the Third Annual Latino Critical Theory Conference, sponsored by the University of Miami School of Law and the Critical Race Theory Conference at Yale Law School. I would like to thank all of the participants for helping me to develop and refine the ideas, and in particular, Taunya Banks, Paulette Caldwell, Max Castro, Bonnie Thornton Dill, Mary Louise Fellows, Sharon Harley, Nancy Ota, Laura

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So long as individuals are authorized to dispose of their property as they choose, a society runs the risk that an inadequately socialized owner will disrupt the harmonious social relations that should order it.<sup>1</sup>

— *Mark V. Tushnet*

Which of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family?<sup>2</sup>

— *Chief Judge Lumpkin, Supreme Court of Georgia, 1864*

## INTRODUCTION

### A. *Private Law and the Dead*

This is an article about private law, race, and sex. More specifically, it is about the succession of estates, sexual relationships, and the ways in which antebellum private law traced a delicate and often brutal dance around the issues of race, wealth concentration, miscegenation, gender roles and even, occasionally, the norms of formal equality.

The focus on private law and, stranger still, wills and intestate succession, is an initially implausible, or at least an unfamiliar one in examining racial issues in this country. Scholarly and popular attention have understandably focused on public law and the living, rather than on private law and the dead. Thus there is an immediate understanding that the *criminal prohibition* of interracial marriages is something worthy of study. *Loving v. Virginia*<sup>3</sup> perhaps remains the Supreme Court's most eloquent statement about racism and its perpetuation. But private law seems more marginal; perhaps because it is assumed to be of secondary importance as compared to the direct invocation of state force.

This article takes a different view of private law by examining nineteenth-century cases involving the rights of formerly enslaved women and their children to postmortem transfers of wealth.<sup>4</sup> Southern courts had to

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1. MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 188 (1981).

2. *Bryan v. Walton*, 33 Ga. 11, 24 (1864).

3. 388 U.S. 1 (1967) (holding unconstitutional state statutes criminalizing interracial marriage). This article is part of a larger project that seeks to show how private law doctrine has affected the development of America's racial economy. A consideration of the private law roots of the *Loving v. Virginia* decision is part of a different work in progress.

4. I adopt the term "enslaved" rather than "slave" to describe persons held in bondage. I do so in order to highlight the fact that people are not *born* into servitude. Others force such conditions onto them, with the assistance of state-sanctioned, and often state-sponsored, violence and coercion. Enslavement is not a one-time determination of status; rather, it must be enforced and maintained on an ongoing basis. Historian Kenneth Stampp quotes one southern judge: "The power of the master must be absolute, to render the submission of the slave perfect." KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 141 (1956) (quoting Letter from

decide how status and race affected the doctrinal mechanisms that governed estate distribution, inheritance through intestate succession, and testamentary transfers through wills. In each of these cases, the legal characterization of the women's sexual behavior was a contested matter. In a line of pre- and post-Emancipation cases in Alabama, black families argued that the sexual relationships they formed under slavery ought to yield succession rights to estates, or what one state supreme court justice called "inheritable blood."<sup>5</sup> In a pair of South Carolina cases, white heirs challenged efforts by wealthy white men of the southern plantocracy to transfer via last will and testament large amounts of property to black women with whom they had sexual relationships and fathered children.<sup>6</sup> The disposition of these and other claims presented a fascinating raft of tensions in nineteenth-century law and society.

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Charles Pettigrew to Ebenezer Pettigrew, Pettigrew Family Papers (May 19, 1802)). Louisiana offers a perfect example of the codification of the state's role in enslavement:

The condition of a slave being merely a passive one, his subordination to his master and to all who represent him, is not susceptible of any modification or restriction . . . he owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and he is consequently to execute all the orders which he receives from him, his said master, or from them.

Black Code of Louisiana, Acts Passed at the First Session of the First Legislature of the Territory of New Orleans § 18 (1806) (repealed 1868).

5. *Malinda & Sarah v. Gardner*, 24 Ala. 719, 724 (1854).

6. See *Jolliffe v. Fanning & Phillips*, 44 S.C.L. (10 Rich.) 186 (1856); *Farr v. Thompson*, 25 S.C.L. (Chev.) 37 (1839). Like many historians of the South, I use the term plantocracy to describe the southern political economy in which the mode of production, slavery, structured social and economic relationships. As Eugene Genovese described it:

The plantation society that had begun as an appendage of British capitalism ended as a powerful, largely autonomous civilization with aristocratic pretensions and possibilities, although it remained tied to the capitalist world by bonds of commodity production. The essential element in this distinct civilization was the slaveholders' domination, made possible by their command of labor.

EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH 15-16 (Wesleyan Univ. Press 1989) (1961); see also STAMPP, *supra* note 4, at 385 ("No other profession gave a Southerner such dignity and importance as the cultivation of the soil with slave labor."). Peter Kolchin determined that the average wealth of slaveholders in 1860 was 13.9 times that of non-slaveholders, and that slaveholders owned 93.1% of agricultural wealth. See PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877, at 180 (1993).

Following the English aristocracy, the planter class was remarkably concentrated. Nearly three-quarters of free southerners "had no connection with slavery through either family ties or direct ownership. The 'typical' Southerner was not only a small farmer but also a nonslaveholder." STAMPP, *supra* note 4, at 30 (noting regional variations). And of those who were slaveholders, 88% enslaved fewer than twenty bondspeople. See *id.* While historians technically define those who enslaved more than twenty as "planters," Stampp's research shows that the "planter aristocracy was limited to some ten thousand families who lived off the labor of gangs of more than fifty slaves." *Id.*; see also ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 86 (1988) (classifying planters as households enslaving more than twenty, "small" households enslaving ten to nineteen, and "yeomen" those enslaving nine or fewer); KOLCHIN, *supra*, at xiii (defining a "planter" as one with twelve or more slaves).

Ownership of *enslaved* wealth was a crucial factor in measuring class. Gavin Wright concluded: "In the antebellum South, wealth and wealth accumulation meant slaves, and land was distinctly secondary." GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE

The material effect of the particular types of cases featured here may seem of marginal impact, at least over the scale of an entire economy. Relatively few women who were enslaved ended up as parties to such suits. Yet I will argue that these case studies open a window on a more general economy of race, status, and sex operative in the antebellum and postbellum South.

### B. *Material Effects and Ideological Tensions*

Taking the case studies as its starting point, this article plots the doctrinal axes that governed estate disposition and the ideological and distributional consequences to which that legal matrix contributed. Probing the entitlements that stemmed from doctrinally conferred abilities and disabilities shows how apparently neutral laws regulating testamentary transfers and intestate succession regulated and negotiated the racial economics of sex. The article then contrasts pre- and post-Emancipation decisions, revealing a shifting, but essentially consistent framework at work in both periods. I compare the claims the law enabled and those it denied in both eras, giving close attention to the judicial rhetoric accompanying the rules.<sup>7</sup> In so doing, I try to illuminate the role of private law in negotiating and reconciling what sometimes appear to be contradictory imperatives of preserving private property and maintaining racial hierarchy, while maintaining the legitimacy of the legal system.

As these case studies will emphasize, sexual bonds often generate economic relationships. It is the task of private law to determine which relationships will give rise to enforceable (or permissible) obligations, and which ones will not. Succession law sorts and ranks relationships that stem from sexual or companionate bonds between men and women, or biological ones between generations. The complexity of this shifting classificatory scheme is beyond the scope of this article; what is relevant to the inquiry here is the distinction drawn between those sexual or biological relationships that yield legal obligations and entitlements and those that do not. Feminists have long noted how legal determinations of this sort have historically operated to the

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SOUTHERN ECONOMY SINCE THE CIVIL WAR 19-20 (1986); *see also* STAMPP, *supra* note 4, at 27 ("Southerners measured their rank in society by counting their slaves."). *See generally* CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES UNTIL THE PRESENT (1987) (describing the southern political economy and its reliance on slaves).

7. Mark Tushnet embraces a similar method in his important book on ideology and slave law. He remarks:

As descriptions of structures of thought, judicial opinions are not incomplete in the way they are as descriptions of practice. Further, because they are public documents designed to convince, judicial opinions set out premises accepted quite widely and attempt to gain assent to a particular result by showing how that result can be derived from those premises.

TUSHNET, *supra* note 1, at 19.

economic and social detriment of women and their children.<sup>8</sup> While law denied property rights to many white women for failure to adhere to rigid norms of sexual propriety, for black women the regulation was complicated by disabilities of status (enslavement) and race.<sup>9</sup> By investigating efforts of the formerly enslaved to establish intestacy chains on behalf of their families, this article illustrates how the legal assignment of economic abilities and disabilities to sexual relationships distributed wealth not only between men and women, but also between whites and blacks. It also gives close attention to the ideological productions that accompanied the articulation of the rules of law.

Like the inheritance conflicts, the testamentary transfer case studies also raise questions regarding how race and status affect the economic consequences of sexual relationships. In the instance of the wills, though, these concerns are complicated by their explicitly interracial dimension. The few other scholars who have noted the testamentary emancipations have approached them as romantic ruptures in the racist fabric of southern enslavement.<sup>10</sup> In fact, these wills provide a fascinating set of insights on something considerably more material than romance.

Even under a simplistic and materialist analysis, their probate presents an obvious challenge to courts: to uphold property rights (in this case, testamentary freedom) without disrupting racial hierarchies. Southern antebellum culture<sup>11</sup> is typically represented as strongly committed to both racial hierar-

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8. See, e.g., Ellen Ross & Rayna Rapp, *Sex and Society: A Research Note from Social History and Anthropology*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 62-67 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (indicating the ways in which legal and social processes shape sexual relations). See generally SHAMMAS ET AL., *supra* note 6; Mary Lou Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991) (arguing that wills and trusts law still preserves a patriarchal system); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994) (arguing that there are racial differences in impact of marriage on women's wealth); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994) (analyzing the distribution of entitlements in divorce claims, and arguing that courts should change coverture's allocation of property).

9. See Mary Lou Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1993) (exploring, *inter alia*, racial effects of legitimacy in inheritance law); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDozo L. REV. 309, 330-31 (1996) (summarizing effects of enslavement on inheritance).

10. Marxist historian Eugene Genovese speculated: "Many white men who began by taking a slave girl in an act of sexual exploitation ended by loving her and the children she bore." EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 415 (1974). Historians' treatments of these wills are given further attention in Part III *infra*.

11. In directing my inquiry to slavery in the antebellum United States I have narrowed the scope of the article both temporally and geographically. For broader accounts of slavery, comparing cultures and periods, see generally DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966); DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS (1984); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982); and ALAN WATSON, SLAVE LAW IN THE AMERICAS (1989).

chy and private property. Usually, support for property rights strengthened racial hierarchies. But as these wills show, interracial liaisons in a racialist system raised the possibility of wealth transfers from whites to blacks. Such diversions of wealth would appear to threaten antebellum economic and social hierarchies predicated on race, gender, and (enslaved) status. Investigating how law managed the testamentary transgressions by elite white men of the very social norms and hierarchies that benefited their class yields greater understanding of the relationship of property to race, gender, and sex.

Besides providing insight into the material effects of the law of wealth transfers as a whole, these wills raise other disturbing ideological and cultural questions: questions about the *possibility* of affection between the races, the actual extent of black-white sexual liaisons, and the morality of the fate of children born to such liaisons. To uphold the will would be to imply that a rational person could love a person of a different race and feel the impulse, perhaps even the moral imperative, to provide for their material comfort and practical support.<sup>12</sup> To refuse to give effect to the will would raise the specter that the state can overthrow the sovereign choices of the property-holder, declaring some appropriate and others forbidden.

The legal doctrine tiptoes through this minefield, offering in the process some raw material for those who like to speculate more broadly about legal theory and the relationship of legal doctrine to social form.

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Temporally, there are two predominant ways of defining the antebellum era. I adopt the broader periodization, which distinguishes colonial (1600s-1770), Revolutionary (1770-1800), and antebellum (1800-1860) America. See, e.g., KOLCHIN, *supra* note 6, at 28. Other historians consider the politics of the early and mid-nineteenth centuries sufficiently distinctive that they classify as "antebellum" 1820 or 1830 through 1860. See, e.g., WILLIAM J. COOPER, JR., THE SOUTH AND THE POLITICS OF SLAVERY, 1828-1856, at 11 (1978) (placing the beginning of the period at the election of 1828, when southern states rallied behind Jacksonian Democrats); STAMPP, *supra* note 4, at 28 (labeling 1830-1860 the period of antebellum slavery). For detailed discussions of colonial slavery, see, for example, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); KOLCHIN, *supra* note 6, at 3-92; and EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975). See generally THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH (Catherine Clinton & Michele Gillespie eds., 1997) (presenting essays on questions of slavery and gender in colonial era); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 (1996) (including colonial practices and issues in discussing slavery). More specific regional investigations of southern slavery will be referred to intermittently in this article.

12. As Eugene Genovese wrote in his 1974 book: "The tragedy of miscegenation lay, not in its collapse into lust and sexual exploitation, but in the terrible pressure to deny the delight, affection, and love that so often grew from tawdry beginnings." GENOVESE, *supra* note 10, at 419. This article agrees with Genovese's argument that analyses of miscegenation ought not devolve into flat attributions of total power and powerlessness to slaveholders and enslaved women, respectively. My task, though, is to offer a more complex rendering of these relationships than Genovese's, by illuminating the law's presence as a structuring force.

### C. Why These Cases?

This article uses the private law contested in these case studies to offer further illumination of the antebellum regulation of sexual relationships, particularly those involving black women. It examines the social meanings of these wealth transfers by grounding them in what I describe as the antebellum sexual economy. Though other scholars may find the study interesting for its own sake, my hope is that it offers some insights into more contemporary issues: this, after all, is a study of the maintenance of race and gender hierarchies and an analysis of the racial impact of facially neutral doctrinal frameworks. Neither topic is of merely historical importance. It is my hope that this work and others like it might enrich the debate among feminists, gay rights activists, and the broader civil rights community about what is at stake in the legal characterization of companionate sexual relationships. In arguing for an expanded focus on the connection between sexual relationships and property rights, the article tries to expand on a rich tradition in feminism and critical legal theory: a challenge to the public/private armor that segregates family from market and sex from economics.

This article at certain points will concentrate on sexual relationships between white men and black women, although many scholars identify interracial relationships between white women and black men as historically (and currently) more socially transgressive.<sup>13</sup> I chose to focus on white men and black women because I believe that it is these relationships that provide the greatest insight into racial fissures within southern ideology. I also focus on relationships that resulted in testamentary transfers, admittedly rare occurrences.<sup>14</sup> I do so for a reason. While more mainstream accounts of these testamentary transfers see them as romantic exceptions to the norm, I believe that they actually have much to tell us *about* the norm. By exposing most clearly the ligaments of legal doctrine around sex, race, marriage, and death, they actually help us to understand the role of law in both material and ideological terms. Other focal points were clearly possible; for example, some free women of color had relationships with white men resulting in testamentary transfers. I chose to focus on women who suffered under the disabilities of slavery to reveal the contradictions and evolution of private law doctrine as it struggled to manage the racial economics of sex.

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13. See, e.g., Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 125-34 (1984); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1994-2000 (1989); Martha E. Hodes, *White Women and Black Men in the Nineteenth Century American South* (1991) (unpublished Ph.D. dissertation, Princeton University) (on file with the Princeton University Library).

14. Historian Dorothy Sterling's study identified almost 100 such wills. See *WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY* 29 (Dorothy Sterling ed., 1984).

#### D. Terminology

A quick note on terminology. In writing this article, I have stumbled over several linguistic lacunae. It is difficult to find terms in twentieth-century vocabulary to describe the relationships of the antebellum period. In discussing the relationships between the enslaved, I hesitate to use the term "marriage," as that term designates a series of legal relationships that were denied to the enslaved.<sup>15</sup> Instead, I use the terms "companionate relationships" and "sexual family" interchangeably.<sup>16</sup>

More troubling has been the inability to find satisfactory terms to refer to the black women I will discuss or to describe their relationships with the elite white men who enslaved them. Many phrases which appear descriptive, or which I might use as terms of art, carry too much social baggage to be helpful.<sup>17</sup> The absence of language is itself suggestive of the unsatisfactory nature of the existing conversations on this topic. While American culture has no shortage of labels and phrases to describe women who engage in sexual relationships outside of marriage, most of these terms are embedded in antiquated and rigid ideologies of gender that are very hostile to women and their sexuality. It is a testament to the pervasiveness of sexual violence against women and Western requirements of female monogamy and sexual purity that almost all such language turns on the presence or absence of female consent or the attribution of immorality. There is no term to describe the mere fact of a relationship. Moreover, most of these terms cannot account for the complexity of nineteenth-century male sexual power combined with race and status differences.

This is especially the case in Parts I, II, and III, when I discuss the antebellum era and women who were enslaved. Some feminists have re-

15. "Marriage fixed legal statuses. It regulated property ownership, transmission, and control; legitimated children; contained sexuality; and determined legal power relationships by gender and age." Emily Field Van Tassel, "*Only the Law Would Rule Between Us*": *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 925 (1995). On the denial of marital rights to those enslaved, see Part II *infra*.

16. Cf. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 226-36 (1995) (advocating the abolition of marriage as a legal category and a shift in legal emphasis from sexual family of father, mother, and child to a mother/child dyad). Although I use the terms "companionate" and "sexual" interchangeably in the context of describing families and relationships, legal doctrine is not so cavalier. Lack of sex (whether voluntary or involuntary) is sufficient grounds for ending and, in some instances, annulling marriages.

17. For instance, the terms "mistress," "paramour," "lover," "partner," and "sex slave" imply variously privilege, quid pro quo, adultery, equality, the erotics of submission, or, perhaps most troubling of all, choice. "Mistress" in particular is problematic, as in antebellum society it enjoyed a racially coded meaning to denote white women who ran plantation households, roles specifically denied to black women. None of these terms captures the constraints or circumstances under which enslaved women lived and made decisions about their sexuality. As a final word, it is interesting to note that so many terms have been corrupted by the sexual imagery ascribed to power relations. "Sex slave" is an especially disturbing one in the context of this article.

solved this by arguing that all sexual relationships between enslaved women and white men amounted to rape because of the unavailability of rejection and hence the lack of meaningful consent. I do not find this to be a very satisfying result, in that it leaves a monolithic and undeveloped rendering of both the relationships and the women. Also, it fails to characterize and distinguish the multiplicity of forces, coercive devices, arrangements, and ideologies that the antebellum sexual economy made available to white men seeking interracial sex.<sup>18</sup>

I will use the term “concubine” as a term of art to connote the fact of an ongoing relationship between a slaveholder and a woman whom he enslaves that does not stem from his personal violence (as opposed to the pervasive violence of the institution of slavery), and that appears from the record to have some degree of affection on either or both sides.<sup>19</sup> Of course, my definition immediately encounters problems due to the nature of the institution. The violence of the entire system of slavery, imposed both by the state and by individuals, meant that many men could induce sexual relations without having to resort to acts of violence themselves. In addition, relying on records to attribute affection may yield distorted histories as the legal records and many of the other formal documents were recorded by the slaveholding class. I acknowledge these weaknesses alongside the more general weakness of spending excessive energy on definitions. Part of this project is to start conversations about the relationships among economics, sex, and power that generate richer, more descriptive vocabulary to describe sexual relationships. Even better, however, would be a richer and less constrained *reality*.<sup>20</sup>

## I. THE RACIAL ECONOMICS OF SEX

In every society, the schemes governing transmission of “wealth” (scarce resources) from one generation to the next speak volumes about the political

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18. See Part III *infra*.

19. Historians John Blassingame and Deborah Gray White use the term as I do. See JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 83 (1972); DEBORAH GRAY WHITE, ARN'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 35-37 (1985); see also STAMPP, *supra* note 4, at 355 (distinguishing concubinage from more fleeting sexual relationships). Among historians of slavery, “concubine” has the overtones of a companionate, non-marital, but often economic relationship, in some part due to its pervasive usage to describe relationships in Louisiana’s distinct sexual economy of this era. See, e.g., JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 185 (1994) (using the term interchangeably with mistress). One of the unique features about Louisiana’s antebellum sexual economy was its limited legal recognition of both intraracial and interracial nonmarital sexual relationships. See *id.* at 199-200.

20. Cf. 2 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 164-66 (1990) (noting that black feminism must envision and articulate empowering aspects of black women’s sexuality); AUDRE LORDE, SISTER OUTSIDER 53-59 (1984) (describing potential of the erotic as source of power and information).

economy and its ideology.<sup>21</sup> In the United States, the law of estate distribution has performed an intricate negotiation with the "dynastic strategies" of English common law.<sup>22</sup> The remainder of this article shows how slavery complicated the articulation of this already very complex doctrine.<sup>23</sup>

#### A. *Inheritance in America*

At the time of the American Revolution, the English law of estate disposition still expressed a strong preference for the lineal, intergenerational transfer of wealth. Doctrinal rules endorsed this mode over intragenerational transfers to conjugal partners or collateral kin, and also imposed severe limitations on transfers of wealth outside of kinship lines.<sup>24</sup> In so doing, the law continued in many ways to embody feudal political and economic norms of land concentration in a male-headed, manorial family. Maintaining this pattern entailed restricting the testamentary power, by which a property holder could implement his own personal preferences for the transmission of his wealth after death. Many of the intricate devices that weighed upon the common law of estates arose from the relatively constant tension between individuals' desires to exercise postmortem authority over wealth and social needs to restrain and conserve wealth for the good of the dynastic family.<sup>25</sup>

Inheritance is fundamentally an economic process in which sexual relationships become dispositive. Ellen Ross and Rayna Rapp identify how kinship systems define and allocate wealth in societies such as our own in which wealth is not initially communally owned or does not "escheat" to the community (or the state) after an individual's death.<sup>26</sup> In Anglo-American law, legitimacy has been a determinant factor in directing succession; some sexual relationships yield economic entitlements to conjugal partners and their children.<sup>27</sup> Other sexual relationships, which do not conform to specified rituals or behavior patterns, are classified as outside of the sphere of property

21. See, e.g., SHAMMAS ET AL., *supra* note 6, at 4-9; John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 722-25 (1988); Ross & Rapp, *supra* note 8, at 54-56; see also STAMPP, *supra* note 4, at 202 ("Everywhere people invested cash in bondsmen as people in an industrial society would invest in stocks and bonds. Affluent parents liked to give slaves to their children as presents.").

22. See SHAMMAS ET AL., *supra* note 6, at 57.

23. For a more general discussion of southern and northern rules of land and wealth transmission in this period, see *id.* at 3-102.

24. Richard Chused warns against viewing or representing the pre-nineteenth century English common law of estates and succession as static. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1385-89 (1983). In fact, it was fluid and shifting at precisely the moment that the American colonies and early states were themselves enacting major changes. *See id.*

25. See SHAMMAS ET AL., *supra* note 6, at 208-09.

26. See Ross & Rapp, *supra* note 8, at 54-57.

27. See, e.g., MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 196-233 (1985); Fellows, *supra* note 8, at 138.

relationships. Because men overwhelmingly held and controlled wealth through the nineteenth century, succession law defined the relationship of most women to the economic fruits of their household.<sup>28</sup> Absent a will, succession doctrine assigns and prioritizes rights to an estate, therefore establishing initial “bargaining positions” in the language of law and economics.

The basic elements of the property regime in the United States adhere to English common law. But the post-Revolutionary states departed in significant ways from feudal principles, reflecting the emerging cultural norms and economy that proved distinctive of the burgeoning republic.

Post-Revolutionary America saw a marked growth in testamentary freedom in tandem with the abolition of primogeniture, entail, and other common law devices that restricted the ability to make individual dispositions of property.<sup>29</sup> Through a will, a testator could disinherit the second generation; American fears of dynastic disaster did not match those of England. The colonial and post-Revolutionary family was increasingly defining its primary bonds as conjugal (today we might say nuclear) rather than dynastic. Also, the young republic did not tie land ownership to political and economic caste to the same degree as feudalism had, and land was increasingly liquidated for its economic value, reflecting its new status as one of several valuable commodities in a market economy.<sup>30</sup>

Even in the absence of a will, the laws of intestate succession directed the transmission of a decedent’s wealth to an increasingly broadly defined subsequent generation. Eldest sons were decreasingly preferred, and daughters began to share more equally with sons. In addition, there were sporadic impulses of awarding widows expanded rights to a husband’s estate, commencing what would become a trend toward recognizing widows’ conjugal inheritance over “lineal glory.”<sup>31</sup>

In the southern states, these redefinitions of inheritance practices incorporated specific rules to deal with the political economy of slavery. Balancing testamentary freedom versus lineal descent of wealth and redefining chains of succession were complicated by slavery’s peculiar treatment of race and sexuality, as suggested by the following case.

28. Well into the nineteenth century, men owned 85-90% of property. *See SHAMMAS ET AL., supra* note 6, at 209. Women and children held less than 10% of male wealth in 1860. *See Chused, supra* note 24, at 1364 (citing LEE SOTLOW, MEN AND WEALTH IN THE UNITED STATES, 1850-1870, at 200 n.12 (1975)). Coverture gave husbands absolute ownership or daily control over their wives’ property, depending on whether it was personal or real. In addition, few women inherited property, meaning that most of the wealth they might enjoy was earned in their household during their adult lives. *See id.* at 25.

29. *See SHAMMAS ET AL., supra* note 6, at 208.

30. Unlike its scarcity in England, land in America was relatively widely available to free whites. Furthermore, land was not the sole determinant of social, economic, and political status. *See id.* at 208-09.

31. *See id.* at 209-11.

### B. The Southern Dimension of Inheritance

In 1808, the estate of Charles F. Bates, an attorney and planter in Virginia, became the subject of a complicated probate.<sup>32</sup> The conflict arose from the existence of two testamentary documents, one dated 1799 and the other dated 1803. Both of these documents had been executed prior to Bates' marriage to Mary Heath Bates in 1806. There was no question that Bates had revoked the second will by cutting his name out of it. But Bates' widow argued that because the second will included a general clause with an intact signature revoking all prior wills, her husband had destroyed both wills and hence had died intestate.<sup>33</sup> As the couple had no surviving children, Bates' widow would have been his principal heir under Virginia succession law. In contrast, Bates' mother argued that his cancellation of the second will also canceled his revocation of the first will, leaving that document intact and dispositive. His mother was the primary beneficiary of the first will.

In an *en banc* rehearing, the Supreme Court of Appeals of Virginia concluded that both wills had been canceled. Thus, Bates was declared an intestate, entitling his widow to the majority of his estate. As is typical in probates and challenges to wills, the holding of the court turned on its assessment of Bates' intent.<sup>34</sup> They determined that he had planned to author a third will to govern the disposition of his estate, and in the interim had revoked both of the previous documents.

There was an intriguing revelation in Bates' second will of a daughter born prior to his marriage to Mary Heath Bates. Bates had written:

I have a daughter called *Clemensa*, at *Walter Keeble's*, in *Cumberland*, I declare her to be free to every right and privilege which she can enjoy by the laws of *Virginia*. I most particularly direct, that she be educated in the best manner that ladies are educated in *Virginia*. I give her my lot in the town of *Cartersville*, and three hundred dollars, to be laid out at interest, renewed yearly, and paid when she marry or come of age.<sup>35</sup>

Bates introduced his only child into antebellum Virginia society<sup>36</sup> as illegitimate, black, and enslaved.<sup>37</sup> Her presence in certain aspects of the case and

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32. See *Bates v. Holman*, 13 Va. (3 Hen. & M.) 502 (1809).

33. The clause stated: "I revoke all other wills heretofore made by me." *Id.* at 505.

34. On intentionalism and anti-intentionalism in the construction of wills, see generally Michael Hancher, *Dead Letters: Wills and Poems*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 101 (Sanford Levinson & Steven Mailloux eds., 1988). Hancher quips that "[w]ills and testaments are the legal genre that most emphasizes the problem of the death of the author." *Id.* at 108.

35. *Bates*, 13 Va. (3 Hen. & M.) at 504-05.

36. We can infer that Bates' relationship with Clemensa was a secret, as he told the farmer with whom he boarded Clemensa that her father's name was George Alexander Stevens Trueheart. See *id.* at 509. None of the many witnesses who testified during the probate of his estate mentioned their knowledge of a daughter.

37. The significance of each of these is discussed in Part II *infra*.

her marked absence in others illustrate how slavery added a racial dimension to postmortem wealth transfers.

### C. Sexual Relationships and Material Commitments

Bates' mother and widow, the parties to the case, struggled over whether Bates' probate would be governed by a will or the law of intestacy. Testamentary transfer and intestate succession are the two mechanisms through which Anglo-American law disposes of estates. Testamentary transfers are essentially wealth transactions after death, which are not enforceable until death, while intestate succession governs the default, dictating distribution of the estate in the absence of a will. Wills might then be thought of as privately directed transfers, which probate courts must decide whether to implement or invalidate. In the absence of a will, or in the case of its invalidation, intestate succession emerges as the state's fixed preference for the descent of estates.<sup>38</sup> Thus, the conflict in *Bates v. Holman* implicated both of the doctrinal mechanisms that govern postmortem wealth transfers.

Per succession law, neither widows nor parents were entitled to full inheritance. Intestacy law directed the lineal transmission of estates, with a life interest in a conjugal partner. Why then was Bates' daughter, Clemensa, not permitted to revel in "lineal glory?"

None of the several opinions issued by the court noted where Clemensa stood within the line of intestate succession. Her potential status as an "heir," who might exercise her own claim to the estate, thereby altering the distribution of the estate between Bates' widow and mother, was completely overlooked. In fact, one of the opinions says, "[T]he law makes ample provision for the widow: but far different is the case respecting his natural daughter, who, together with her future offspring, the law has doomed to perpetual slavery, to her nearest blood relations, unless emancipated by their clemency . . ."<sup>39</sup> A similar expression of sentiments is as follows:

As to *Clemensa*, it is, *perhaps*, her misfortune that the testator died intestate: I say, *perhaps*, for circumstances might have happened to change his opinion on that subject. Her's [sic] is, at most, the common case of a party's failing to provide by will for those who have strong claims upon him.<sup>40</sup>

It appears clear that any rights, whether to emancipation or wealth, inuring to Clemensa would stem from Bates' own testamentary authority, and not from her own rights of inheritance. Hers is a missing link in the chain of estate

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38. Intestate succession doctrine has historically directed the transmission of the majority of estates, as most Americans die without having exercised the testamentary power. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 218-21 (1973).

39. *Bates*, 13 Va. (3 Hen. & M.) at 546.

40. *Id.* at 537.

succession for reasons the court does not feel compelled to explain, but only to lament.

I turn then to the will. In it, Bates recorded his intent to disinherit his white heirs from a portion of his estate, and leave it to his emancipated black daughter.<sup>41</sup> Such a testamentary transfer clearly deviated from the distribution that succession law would have ordered, and it appears to transgress southern norms of propriety.

Yet the court gives very strong indication that it would have upheld the interracial transfer of freedom and wealth contemplated in the will, had Bates not revoked it. In addition to the paragraph quoted above, one of the opinions proclaimed that "it is much to be lamented, that he was, by the hand of providence, prevented from making a suitable provision for the two worthy objects of his filial and paternal regard and affection; and for whose welfare and happiness he had uniformly shewn the most laudable solicitude."<sup>42</sup> Moreover, the court's holding that Bates had intended to revoke both wills was based in large part on its conclusion that he must have planned to create a *third* will, providing for both his wife and Clemensa. One judge wrote:

[The testator] then had a young wife, in the seventh or eighth month of her pregnancy, with the prospect of a numerous progeny before him; besides the moral, as well as natural obligations he was under, to make ample provision for his illegitimate daughter, already recognised and emancipated, and for whose welfare and happiness he had shewn very great anxiety and solicitude. To me it is inconceivable that any rational man, with the common feelings of humanity, thus circumstanced, could suffer such a will to exist for a single moment: but we have already seen that it had been deliberately and solemnly revoked.<sup>43</sup>

Even as one member of the court, Judge Fleming, expressed his own displeasure at Clemensa's existence and condemned Bates' "having formed an imprudent (though not uncommon) temporary connection,"<sup>44</sup> he applauded Bates' motives:

[Bates] recognised the *fruit* of his unhappy amour, called her his daughter *Clemensa*, declared her to be *free*, gave particular directions respecting her education, and made a handsome permanent provision for her, manifesting thereby a laudable instance of natural affection, and making the best atonement in his power, for his former indiscretion.<sup>45</sup>

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41. He also recorded the fact of the relationship. Wills offer excellent documentation of interracial relationships. Mark Tushnet notes that legal materials are "both concentrated and nearly the exclusive source of evidence" in the area of miscegenation under slavery. TUSHNET, *supra* note 1, at 13.

42. *Bates*, 13 Va. (3 Hen. & M.) at 547.

43. *Id.* at 545.

44. *Id.* at 540.

45. *Id.* at 540-41. Not all southern courts agreed, though. For instance, in a similar case, one judge wrote:

[G]reat indulgence is extended to the declared wishes of testators, touching what they would have done with their property after their death. If it be true, however, that *families* are the

The strong rhetoric of the opinion is worthy of some consideration. On the one hand, the judges reaffirm the immorality of Bates' sexual liaison, suggesting that such liaisons were unusual and reprehensible rather than fundamental to the political economy of the system of slavery. On the other hand, they present Bates' attempts to provide for Clemensa as laudable, a combination of "natural affection" and sin-offering. As a doctrinal matter, Clemensa's status in the chain of intestacy is not given any legitimacy. Instead, the possibility of her participation in her father's estate is coded through *his* obligation. The court represents Bates as a sovereign property holder motivated by laudable goals. Thus the ironically named Clemensa's claim on her father is merely one of "natural affection," a pre-social set of animal sympathies, rather than the claims of natural justice, still less legal justice. Apart from affirming that natural affection for their illegitimate miscegenetic offspring could still thrive in the hearts of the white elite, the case also offers another role to Clemensa, as an object of penance or atonement, rather than as a subject holding independent legal rights. The case ends by upholding the sovereign power of Bates' intentions (in this case, by declaring that no validly formalized intentions actually existed), and by trumpeting the charity that motivated both Bates' and the judges' own words, even as it puts both that charity and its object firmly outside the ken of the law.

This article seeks to answer some of the questions raised by the conflict and decision in *Bates* and to consider further the complexity of postmortem distribution of wealth in the antebellum South. The *Bates* decision suggests that the tensions between intestate succession and testamentary freedom described in my brief social history were complicated by the sexual and racial dynamics and norms of slavery. Understanding Clemensa's exclusion from the chain of succession to her father's estate entails a consideration of how antebellum law assigned status-based abilities and disabilities to sexual relationships. Intestate succession doctrine excluded from intestacy rights black children like Clemensa, thereby protecting the white lineal family. But Bates' testamentary freedom then permitted him to alter that order, thereby apparently transgressing the norms of race, sex, and property established by intestate succession doctrine.

The remainder of this article examines a series of cases predicated on the postmortem distribution of wealth in the South. It explores the distributive rules in intestate succession and the negotiation of seemingly contradictory

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original of all societies, and contain the foundation and primitive elements of all other social institutions, and as such deservedly claim the front rank in the protection of Courts, *Wills*, which are calculated practically, to disregard and set at naught this divine ordinance, worth more than all that man in his wisdom has ever devised, cannot claim to be regarded with peculiar tenderness and favoritism by Courts of Justice.

Vance v. Crawford, 4 Ga. 445, 460 (1848) (describing a will emancipating some of the testator's enslaved and granting them property if they were to emigrate to Liberia), discussed in TUSHNET, *supra* note 1, at 21-22, 218-19.

imperatives in adjudicating testamentary transfers, giving close attention to judicial language in both instances. This complex body of private law doctrine has not received full attention in slavery scholarship.<sup>46</sup> I emphasize it in order to illuminate the racial economics of sexual relationships, and the pressures they put on the legal system. I hope thereby to offer a richer understanding of the production and maintenance of the various hierarchies of the antebellum sexual economy.

## II. INTESTATE SUCCESSION: THE TALE OF THREE CHARITIES

In *Malinda & Sarah v. Gardner*,<sup>47</sup> the disposition of the estate of a manumitted slave named Tom turned on a legal search among his survivors for what the Supreme Court of Alabama termed "inheritable blood."<sup>48</sup> The court was called to answer two questions. First, would antebellum law accord companionate slave relationships any legal abilities, such as property rights of inheritance? Second, could the court articulate a rationale that would support the legal rule? In a crude sense, the first question might be thought of as distributional, the second as ideological, though in practice, of course, the issues were considerably less clear-cut.

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46. Other scholars have done recent work that overlaps, in some respects, with my own. For instance, others have examined some of the relationships of inheritance law to race and gender in the nineteenth-century South. See Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J. AM. HIST. 835, 854 (1991) (discussing legal attitudes towards concubinage and inheritance); Fellows, *supra* note 9 (exploring racial effects of legitimacy in inheritance law); Harris, *supra* note 9, at 330-32 (summarizing effects of enslavement on gender and inheritance); Eva Saks, *Representing Miscegenation Law*, 8:2 RARITAN, Fall 1988, at 39, 46-49 (discussing the use of "blood" as a means of determining status of property ownership). Each of these offers tremendous insight. They do not, however, give the attention offered by this article to both aspects of succession law: wills and intestate succession. In addition, most of the earlier studies limit their scope to either postbellum or antebellum inquiries.

47. From a different focal point, issues of marriage and race in the nineteenth century are receiving increasing treatment as well. See, e.g., GROSSBERG, *supra* note 27, at 126 ("Throughout the nineteenth century, race provoked a much more determined use of state nuptial authority even than polygamy. Racism ran like a fault through republican marriage law."); Laura F. Edwards, "*The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*", 14 LAW & HIST. REV. 81, 90 (1996) (noting that law did not recognize marriages between the enslaved, and did not give them effect post-Emancipation); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1069-73 (1997) (considering the motivation behind the Scotts' suits as an effort to maintain family integrity); Van Tassel, *supra* note 15, at 891 ("What White Southerners seemed to fear more than mixed-race children was the implication of 'social equality' that mixed race marriage implied."); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African-American Marriages* (November 1996) (unpublished manuscript, on file with the *Stanford Law Review*).

48. 24 Ala. 719 (1854).

49. *Id.* at 724.

### A. "Inheritable Blood"

Tom was enslaved until 1828, when his owner's will directed his manumission. The same will also emancipated Tom's companion, a woman named Charity. As legislative authorization of testamentary manumissions was required in Alabama, later that year the legislature gave effect to the testator's wishes, passing an act that emancipated Tom and Charity, as well as their two children, Malinda and Sarah.

Prior to their manumission by the legislature, Tom and Charity had ceased their relationship. By the time he gained his freedom, Tom had "taken up" with another woman, also enslaved. Coincidentally, this second companion was also named Charity. Tom purchased her, and although they shared a public companionate relationship until Tom's death, because he never emancipated her they were also bound by the legal relationship of master and enslaved. In addition, the rigidity of the doctrine of *partus sequitur ventrem*<sup>49</sup> dictated that their children, Organ, Miles, and Rebecca, were the slaves of their father.

During the probate of Tom's estate, the court determined that he had died without a will (intestate), not an uncommon occurrence in that culture, particularly for free people of color.<sup>50</sup> Therefore the court proceeded to dispose of his estate according to principles of intestate succession.

The probate court concluded that none of the relationships that any of the parties shared with Tom rose to the level of a legal entitlement to his estate. Since he died without legal heirs, the law dictated that his estate would escheat to the ownership of the state of Alabama. The factual intricacies of the case become essential to understanding the parties' claims and the results.

Because Tom held them as his slaves, the second Charity and their three children were included in his estate that escheated to the state. Case law was well-settled that a decedent's estate could and did include his own family, even in the case of blacks who publicly held themselves out as family.<sup>51</sup> The state legislature subsequently passed an act emancipating all of Tom's slaves that had escheated (his family) and relinquishing the state's claim to the remainder of the estate. The act directed that the rest of the property be distributed among the second Charity and all five of Tom's children "in such

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49. "[T]he offspring of a slave belongs to the mother, or follows the condition of the mother." BLACK'S LAW DICTIONARY 1121 (6th ed. 1990).

50. See SHAMMAS ET AL., *supra* note 6.

51. One might wonder why a (black) man would enslave his family, rather than purchasing them and then manumitting them. But other cases show that *Gardner* was not unique in this regard. See, e.g., *Kyler & Wife v. Dunlap*, 57 Ky. (18 B. Mon.) 561, 567-68 (1857) (free blacks could enslave only their family members, and family members so held were subject to seizure by creditors). One can only speculate about the motivations that would lead to such a dynamic.

portions as it would descend to them by the statute of distributions."<sup>52</sup> Paradoxically, having concluded under the classificatory system of intestate succession that Tom died without legal heirs, the probate court was now directed to return to this same scheme to determine the legitimacy and priority of claims. The probate court concluded that all of the five children were entitled to share equally in Tom's escheated, now relinquished estate.

Malinda and Sarah, daughters of the first Charity, appealed the probate court's decision to the Supreme Court of Alabama. They argued that the probate court erred in concluding that Tom had died without heirs, and that because Tom's relationship to their mother had been tantamount to a marriage, they should have been declared the sole heirs of their father's estate at his death. They therefore challenged as wrongful the escheat to Alabama and the subsequent relinquishment and redistribution of the estate to all of the children and the second Charity. Following this logic to its disturbing conclusion, they also argued that the state did not have the authority to manumit the second Charity, or her children, Organ, Miles, or Rebecca. Thus Malinda and Sarah not only sought to exclude appellees from Tom's estate, but to enslave their half-siblings and father's widow.<sup>53</sup>

The appellees responded that the legislative act of 1852 remained dispositive of Tom's estate because the probate court's findings regarding Tom's failure of legal heirs were correct. They argued that the legislative authorization of their manumission was valid, as was the probate court's subsequent determination that all of Tom's children would share the estate equally with the second Charity.

In the very first line of the opinion, the court states the holding and reveals its underlying logic: "Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage...."<sup>54</sup> The author of the opinion, Justice Goldthwaite, relied on standard antebellum doctrine that did not accord the companionate relationships of the enslaved any of the legal rights of marriage.<sup>55</sup> However, if slave un-

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52. *Gardner*, 24 Ala. at 720. The second emancipatory act, passed after Tom had died, purported to free Malinda and Sarah. They had previously been emancipated, though, in the act freeing their mother the first Charity and their father in 1828. *See id.*

53. The assertion of such a claim may stand as a testament to the terrible triumph and logic of slavery. On the other hand, it is important not to attribute to the legal arguments made by lawyers a portrait of the psychological or political commitments of the client. Paulette Caldwell called this point to my attention.

54. *Gardner*, 24 Ala. at 723-24.

55. Although this article mainly limits its analysis to economic relationships and rights that might inure to sexual families, Alan Watson identifies a multiplicity of rights that slave societies have awarded to the intimate relations of the enslaved. For instance, in Latin America, marriages were recognized in order to avoid the sin of fornication. Husbands and wives could not be sold separately. *See* WATSON, *supra* note 11, at xiii.

ions survived emancipation, then civil rights would inure to them, even without formal state licensing. The disability of rights suppressed by enslavement could come to fruition at emancipation. One might think of this as a "dormancy" theory of rights allocation.

In *Gardner*, though, the court determined that Tom and the first Charity had not remained engaged in a companionate relationship legally sufficient to "earn" the rights that a dormancy rule might command to blossom. Likewise, Tom never emancipated the second Charity; therefore, her rights remained "suppressed" at his death. Accordingly, the court affirmed the probate court's findings and upheld the escheat to the state, the legislative manumissions, and the equal distribution of the estate among appellants and appellees.

The distributive effects of the decision are immediately apparent: it disabled the succession of estates among the enslaved. Also, the parties to the suit were *free blacks* who were seeking to terminate the ongoing effects of the disability of slavery. One might still question, though, the significance of the rule. Its consequences might seem superfluous in light of other laws that directly precluded slaves from owning wealth or receiving estates.<sup>56</sup> Moreover, although there were several similar cases, one might also question the material impact of the rule, given the uncommon fact pattern that generated the case.<sup>57</sup> Analysis of the distributive rule yields at least three insights. First, it illuminates the racial effects of a formally neutral doctrine. Second, it supplements and broadens extant analyses of the legal regulation of the enslaved. Last, it identifies the ideological production that accompanied the distributive rule.

## B. *The Private Law of Race and Sex*

The full first passage of Justice Goldthwaite's opinion states:

Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner.<sup>58</sup>

56. "[A] devise or bequest for the benefit of a slave is declared null and void." *Jolliffe v. Fanning & Phillips*, 44 S.C.L. (10 Rich.) 186, 197 (1856).

57. Manumissions of slaves were rare, and the class of people like the appellants in *Gardner* was almost certainly small, although Justice Goldthwaite notes several other decisions on point. See *Gardner*, 24 Ala. at 724; see also STAMPP, *supra* note 4, at 235 (noting that manumissions were only a small fraction of the natural increase of the enslaved population).

58. *Gardner*, 24 Ala. at 723-24.

The court concluded that the companionate and biological bonds asserted by appellants did not yield any legal relationships. Sexual relationships conducted under the rubric of marriage yielded a fixed set of abilities and disabilities that structured the legal relationships of the parties to each other and their offspring. As the conflict in *Gardner* illustrates, many of these abilities entail property entitlements, thereby shaping economic relations between the parties. Denied these abilities, the enslaved were not entitled to the estates of their deceased companions, nor could their children exercise inheritance rights. Thus, the status of enslavement disabled significant property rights that might normally stem from the formation of sexual families.

### 1. Racial effects.

The decision in *Gardner* has interesting effects in the allocation of wealth among groups. In a culture in which men overwhelmingly control wealth, the dormancy rule endorses the concentration of wealth in their hands, regulating women's rights to wealth according to their conformity to standards of sexual and companionate behavior. It thereby promotes gender hierarchy. But the *Gardner* rule suggests that the legal classification of sexual relationships has a racial impact on wealth distribution, as well.

Facially, the dormancy rule disables inheritance rights according to status (enslavement), not race. But the fact pattern of *Gardner* identifies the rule's racial effects. The appellants, Malinda and Sarah, had been manumitted with their father and mother, and hence were not bringing their claims as persons enslaved. But the legal inquiry conducted by the court turned on the characterization of Tom and the first Charity's sexual relationship while enslaved. Even after its removal, the disability of enslavement continued to govern their property rights as free people of color. The case anticipates on a smaller scale the determinations that would have to be made in the postbellum era, following universal emancipation.<sup>59</sup>

The rule has a racial impact in another, perhaps more obvious way, because of the overlap of slavery and race.<sup>60</sup> By law, whites could not be enslaved.<sup>61</sup> Therefore, the rule only applied to the succession of the estates of

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59. See Part IV.A *infra*.

60. Scholars have taken different approaches to its role, but all agree that race was a relevant and significant axis of decision making in southern enslavement. The monumental body of scholarship by A. Leon Higginbotham offers the best linking between status and race. See, e.g., HIGGINBOTHAM, *supra* note 11 (arguing that race was foundational in the formulation of servitude in the colonial era); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7-17 (1996) (describing the operation of racial inferiority as a "precept" of American political thought from enslavement through the twentieth century); see also MORRIS, *supra* note 11, at 9-11 (reviewing different approaches to role of race taken by scholars of slavery).

61. See STAMPP, *supra* note 4, at 194 ("[S]ome slaves were whites by any rational definition as well as by all outward appearances, even though some distant female ancestor may have been a

those who were legally black. The racial rules of enslavement meant that the *Gardner* rule would result in *differential treatment* between whites and blacks. While not *all* blacks were affected, *only* blacks could be affected. Second, most blacks in the South were enslaved, which guaranteed that the rule would have a racially *disproportionate impact*.

Thus, the facially neutral distributive rule is racial in its effect on white and black individual wealth. It was only black estates that would escheat to the state; white wealth would continue to be distributed within the legally defined family. The racial allocation of property rights and thereby wealth perpetuates economic racial hierarchies. In the assignment of property rights, law determines who are the legitimate players in the market economy, a determination with material and ideological effects.

## 2. *Economic personality.*

One of the hallmarks of American chattel slavery is the denial to the enslaved of any legal personality in the economic sphere. Mark Tushnet describes how this complicated many aspects of legal doctrine, which was predicated on notions of bourgeois individualism that were antithetical to the norms of slavery. “[T]he owner, having total dominion over the slave, relates to the entire personality of the slave. In contrast, bourgeois social relations rest upon the paradigmatic instance of market relations, the purchase by a capitalist of a worker’s labor power; that transaction implicates only a part of the worker’s personality.”<sup>62</sup> Sustaining the denial of legal personality posed tensions for some doctrines that stemmed from capitalist relations.<sup>63</sup>

Other political economies permitted slaves some economic rights, and southern law did recognize some legal capacity in other areas, particularly in criminal law.<sup>64</sup> But the exclusion of the American enslaved from the market

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Negro.”); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. UNIV. L. REV. 695, 702 (1996) (noting different, sometimes contradictory rules of defining race, including “scopic” and “genealogic”).

62. TUSHNET, *supra* note 1, at 6. “Southern slave law . . . had to respond to the double reality that the South was a slave society and that it was inextricably bound up, politically and economically, with bourgeois society.” *Id.* at 7.

63. Tushnet, for example, describes how slave law confronted difficulties at its nexus with commercial law, in the applicability of the fellow-servant rule to slaves, for instance. See *id.* at 45-50; see also Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEGAL HIST. 269, 285-305 (1987) (tracing the application of the fellow-servant rule to the enslaved in various southern states); Frederick Wertheim, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112, 1129-36 (1986) (examining both the majority and the minority views of the courts’ treatment of the fellow-servant rule).

64. On criminal legal personality, see, for example, A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992) (analyzing the inequities of Virginia’s criminal law in prosecutions of slaves and free blacks). See also TUSHNET, *supra* note 1, at 72-90, 108-21.

was close to total. While many masters permitted persons they enslaved to trade, hire their time, and amass small savings, these were all customary practices, without legal force.<sup>65</sup> The master owned all of the slave's labor and any property which the slave might acquire.<sup>66</sup> Even torts committed against the person of a slave were construed at law to lie against the master. In denying any legally enforceable market relationships, law precluded the development of what I call "economic personality." It treated the enslaved as a pure commodity.<sup>67</sup>

By economic personality, I mean to emphasize legal subjectivity specifically in regard to market rights. Economic personality is thus separate and distinct from, although related to, political personality. The latter is associated with rights relating primarily to citizenship: the franchise, participation on juries, holding office, ability to attend public schools, etc. These are rights exercised in that sphere of society conceptualized as "public," and thus might also include the ability to participate in physical space and infrastructure (use of parks, transportation, etc.).

As *Gardner* demonstrates, the denial of legal recognition to sexual relationships of the enslaved proved to be an important element in the denial of economic capacity of the enslaved. When historians have considered how law circumscribed the economic personality of slaves, they have largely investigated commercial activity. The distribution ordered in *Gardner* eliminated the economic right of succession stemming from familial, and not commercial bonds. Attention to *Gardner*-type rules is important in understanding the operation and effects of slavery. The economic relationships that might emerge in the formation of family and which antebellum law disabled are not limited to estate distribution.

The rights and obligations to which Justice Goldthwaite referred extend to a woman's right to financial support, a man's right to domestic services, and consortium rights, which are compensable in tort.<sup>68</sup> These are all posi-

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65. Many southerners condemned these informal practices as inconsistent with the institution of enslavement. See, e.g., STAMPP, *supra* note 4, at 164-66, 211. But see *Waddill v. Martin*, 38 N.C. (3 Ired. Eq.) 562, 564-65 (1845) (upholding slaves' claim to testator's estate for payment from crop profits). Ruth Wedgwood argues for a more complex rendering by historians of the relationship between customary law and the law of the courts. See Ruth Wedgwood, *The South Condemning Itself: Humanity and Property in American Slavery*, 68 CHI.-KENT L. REV. 1391, 1394-95 (1993).

66. But see STAMPP, *supra* note 4, at 164 (describing practice of some slaveholders of "paying" slaves to work harder).

67. See, e.g., MORRIS, *supra* note 11, at 102-31 (describing rules governing sales and mortgages of slaves); STAMPP, *supra* note 4, at 142-43 (discussing the difficulty of valuing slaves); TUSHNET, *supra* note 1, at 158-59 (discussing remedy of specific performance for example in sales of slaves).

68. For a discussion of the property rights and duties assigned by marriage from 1800 to 1850, see generally Chused, *supra* note 24 (examining social and political developments surrounding the adoption of married women's property acts).

tive abilities that a party might assert based on his or her companionate status. In addition, *defendants* sometimes found it advantageous to assert the disabilities that law imposed on women. The doctrine of coverture would not enforce as contracts agreements entered into by women classified as married.

Thus, in *Commonwealth ex rel. Stephens v. Clements*,<sup>69</sup> a man who had purchased an escaped enslaved woman from her master sued to enforce an indenture contract she entered with him as a condition of her purchase and manumission.<sup>70</sup> She asserted as a defense that her marriage to a free man of color disabled her contractual capacity, thus rendering the indenture unenforceable. The court disagreed, concluding the special circumstances of the agreement she had entered into (for a manumission) eluded the typical application of the rule. In a parallel case, *Free Frank & Lucy v. Denham's Administrator*,<sup>71</sup> a creditor tried to extend the prohibition of the *Gardner* rationale to all people of color.<sup>72</sup> He argued that a free woman of color could not marry and thus did not enjoy the disability of contractual incapacity. The court disagreed, restating the rule that only the enslaved were precluded from rights and obligations of marriage.

In these cases black women sought the recognition of their sexual relationships as marriages in order to disable their economic capacity. In *Gardner*, they wanted to assert affirmative entitlements to estates. In tandem these cases identify the family as a sphere of often significant economic relationships. The rule denying legal recognition to the sexual relationships of the enslaved was the domestic version of the denial of commercial property rights. In foreclosing the property entitlements and economic disabilities that might arise from the sexual family, the rule completed the segregation of the enslaved, and most blacks, from the market. It thus was an essential force in suppressing black economic personality.

### 3. *Ideological productions.*

I have thus far tried to avoid using the term "marriage" to characterize and categorize sexual relationships. As Justice Goldthwaite's opinion makes clear, the label of marriage is only of peripheral importance. What was at stake in *Gardner* and the other cases described were the rights and abilities, duties and disabilities that may be assigned by law to some sexual relationships. Now, I turn my attention to the social meaning and racial significance of the institution of marriage.

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69. 6 Binn. 206 (Pa. 1814).

70. *See id.* at 206.

71. 15 Ky. (5 Litt.) 330 (1824).

72. *See id.* at 330.

Conceding the emotional bonds shared by Malinda and Sarah's parents, Justice Goldthwaite carefully distinguished the companionate relationships of the enslaved from the civil state of marriage.

There was, indeed, among slaves a permitted cohabitation called contubernium, but it brought with it no civil rights. The cohabitation, therefore, between Tom and the mother of Malinda and Sarah, in a state of slavery, was not marriage, or evidence of marriage. It conferred no rights upon the offspring, and created no legal disabilities on the part of the father from forming a valid marriage, whenever he became in a condition which would authorize him to contract one.<sup>73</sup>

The judge thus uses marriage as a proxy for civil economic rights.

Like Justice Goldthwaite, we tend to assume that relationships that are "marriages" are clearly identifiable, marked by a state-sanctioned ritual. But the legal history of marriage reveals more complex determinations. Under the doctrine of common law marriage (which peaked during this era) sexual relationships not accompanied by the wedding or licensing ritual may still entail "marital" property relationships. Conversely, the doctrine of annulment permits the erasure of marital legal abilities and disabilities even after ritualization. In spite of Justice Goldthwaite's assertions or our own intuitions, "marriage" is a conclusion of law, not a legal justification. It operates in a fluid manner, assigning some companionate relationships rights and denying them to others.

It might be tempting, then, to dismiss marriage as a mere reification, or stepping back a generation from critical legal studies to legal realism, as "transcendental nonsense."<sup>74</sup> Each of these critiques warns, and rightfully so, of the dangers of attributing rationality to fundamentally incoherent series of principles.<sup>75</sup> Doing so only adds to their legal power.

But the fact of the matter is, within the institution of slavery, as elsewhere, the use of marriage to distinguish the sexual family from the legal family had profound symbolic effects. It entailed ideological production as well as distributive consequences. Consider again the role of marriage as a determinative principle in *Gardner*.

The doctrine of intestate succession promotes the intergenerational transmission of individual wealth. Since early in its feudal origins, Anglo-American law has preferred the distribution of estates to kin over escheat to an overlord or the state. Legal definitions of succession have varied sub-

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73. *Malinda & Sarah v. Gardner*, 24 Ala. 719, 724 (1854).

74. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (analyzing roles of transcendental questions in practical legal inquiry). See generally Peter Gabel, *Reification in Legal Reasoning*, in CRITICAL LEGAL STUDIES 25, 25-31 (James Boyle ed., 1994) (describing the concept of reification in legal reasoning).

75. The danger is assuming that rational decisions are being made, when in fact what is happening is a circular process, in which definitional conclusions are based on other definitional conclusions, all within the confines of a closed system, which permits inquiry neither "up" to the world of value judgments, nor "down" to the world of facts.

stantially: the promotion by primogeniture of concentration of wealth in a single, male heir gave way to common law and then statutory schemes that directed the transmission of a decedent's wealth to an increasingly broadly defined subsequent generation. What has remained remarkably consistent is the ongoing ideological preference for distribution of wealth within the defined family structure. It operates as a default rule that can only be overcome by the affirmative exercise of the testamentary power,<sup>76</sup> and even then only to a limited degree.<sup>77</sup> The ongoing commitment to intergenerational transfers is one of the distinguishing features of Anglo-American property law. Companionate relationships formalized through marriage, or biological bonds formed under wedlock, entitle one to be within the chain of succession.

Gardner's denial of marital recognition to the enslaved excluded this class of Americans from the material benefits of the nine-hundred-year-old doctrine of intestate succession. Perhaps more significantly, at the ideological level, it defined their sexual relationships as beyond the tradition of property and family. Justice Goldthwaite's opinion defined the master, and in his absence, the state, as the sole governing legal relationship with the enslaved, or in this case, the black. By casting them in the purely emotional sphere, the rule coded black sexuality with an illicit quality.

#### 4. *The "sexual economy" of slavery.*

Thus the rules of postmortem distribution of wealth suggest the ways in which American slavery was a *sexual* political economy. In calling it a "sexual economy," I mean to draw attention to at least three points about the antebellum South that have gone largely unnoticed.

First, labeling this world a sexual economy highlights the interplay between sexual relationships and economic rights. The term thus collapses the boundary still often drawn between the intimate and market (economic) spheres of human life. Instead, the legal matrix I have analyzed emphasizes how the property and contract doctrine of slavery affected economic rights in the intimate sphere. In slavery as today, economic demands and social norms of slavery defined and often coerced particular sexual practices and partners.

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76. In this sense, the testamentary right is truly a power in the Hohfeldian sense of altering existing relationships. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (discussing the basic conceptual elements involved in legal problems); Joseph Williams Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-88 (1982) (explaining Hohfeld's legal concepts).

77. Companionate bonds limit the extent to which a testator can dispose of an estate. Surviving spouses were entitled to an interest in defined portions of the estate, even in the face of a will.

Second, in implementing the technical doctrine, judges contributed to the sexual ideology of the era. It is now widely known that antebellum criminal law did not protect enslaved women's sexual integrity. A variety of stereotypes and arguments were offered in justification. Most turned on representations of enslaved (black) women's sexual nature as inherently lewd and lascivious. Incapable of sexual satiation, the enslaved woman became incapable of withholding legal consent to sexual relations. As we now know, horrific sexual abuse and exploitation was one characteristic of the culture.

Inheritance patterns do not merely influence family relationships; they define peoples' positions in the larger community and society. The private law doctrine of intestate succession thus contributed to the cultural ideology regarding enslaved women's sexual availability. In refusing to grant standard economic rights that inure to sexual families, civil law, like criminal law, denied legal recognition of enslaved women's sexual relationships.

Finally, referring to slavery as a "sexual economy" is meant to cast new light on old institutions. Slavery is commonly understood to be an institution of racial supremacy. Marriage is typically analyzed along an axis of gender relations. Intestacy doctrine illuminates these institutions at their point of overlap: the economic consequences of enslaved women's sexual relationships. Emphasis on the distributive and ideological effects of the sexual regulations of the political economy of the antebellum South shows how slavery also entailed gender effects in the realm of sexual relations. It was thus a gendered as well as a racially supremacist institution. Conversely, in its exclusion of the enslaved for almost two centuries, marriage appears as a racial, as well as a gendered institution.

Thus, the terminology of the sexual economy hopefully calls attention to how intestate succession and other private law doctrine fit into the larger ideological and material structure of American slavery.

### C. A More Rigid Axis

The *Gardner* rule was not dispositive across the South. Some courts followed a more rigid rule, which rejected the dormancy rule articulated in *Gardner*. In *Howard v. Howard*,<sup>78</sup> a case with facts similar to those of *Gardner*, the Supreme Court of North Carolina rejected the fiction underlying the dormancy rule.<sup>79</sup> It adhered instead to an even more formalistic rule of distribution. As in *Gardner*, a manumitted man purchased the other half of his union. Following the birth of their child, he emancipated her. They

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78. 51 N.C. (6 Jones) 235 (1858).

79. See *id.* at 235. For more discussion of the dormancy rule, see text accompanying notes 55-56 *supra*.

continued their relationship as a free couple. It is this last fact that differentiates *Howard* from both of the relationships at issue in *Gardner*.

In *Gardner*, the Alabama court had concluded that Tom's relationship with the first Charity had not survived their mutual emancipation. Thus it could not "ripen" into a legal, economic relationship. His relationship to the second Charity remained "dormant" at his death, as she was never emancipated. *Howard* then presented the third set of facts that tests the dormancy theory. A couple enslaved, who subsequently are manumitted, and whose relationship continues after emancipation would appear to fall squarely within the limited protection offered by the dormancy rule.

Instead, Chief Justice Pearson rejected that doctrinal approach. In strong language, he declared, "We are forced to the conclusion, that the idea of civil rights being merely *dormant* during slavery, is rather a fanciful conceit, (we say it with respect) than the ground of a sound argument."<sup>80</sup> Other cases, such as *Girod v. Lewis*,<sup>81</sup> a Louisiana case on which Justice Goldthwaite had relied in *Gardner*, have "no application, for, in our courts, marriage is treated as a mere civil institution."<sup>82</sup> The *Howard* court identified the relationship between marriage and contract as a more rigid one, less susceptible to the philosophical niceties of dormancy and ripening that *Gardner* permitted.

The rhetorical logic, though, is the same as in *Gardner*. Chief Justice Pearson intertwines legal capacity and sexuality:

To the suggestion, that as the qualified relation of husband and wife between slaves is *not unlawful* . . . upon the ground of public policy, so far as it comports with a right of property, emancipation should be allowed to have the effect of curing any defect arising from the non-observance of the prescribed form and ceremonies, and the absence of a capacity to contract, as there is plenary proof of consent, which forms the essence of the marriage relation; the reply is:

The relation between slaves is essentially different from that of man and wife joined in lawful wedlock. The latter is indissoluble during the lives of the parties, and its violation is a high crime; but with slaves it may be dissolved at the pleasure of either party, or by a sale of one or both, dependant [sic] on the caprice or necessity of the owners. So the union is formed, and the consent given in reference to this state of things, and no ground can be conceived of, upon which the fact of emancipation can, not only draw after it the qualified relation, but by a sort of magic, convert it into a relation of so different a nature.<sup>83</sup>

*Howard* articulated a more rigid axis of contractual capacity in which manumission does not alter the effects of enslavement. Per the anti-dormancy rule, enslavement is a permanently disabling status, barring the economic consequences of marriage.

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80. *Id.* at 239.

81. 6 Mart. (o.s.) 559 (La. 1819).

82. *Howard*, 51 N.C. (6 Jones) at 239.

83. *Id.* at 239-40.

Despite strong feelings of the judges in both cases, slavery was able to tolerate both the dormancy and anti-dormancy rules. This was to become ideologically and materially infeasible in the postbellum period, as discussed in Part IV.

#### D. Summary: *Charity and Entitlement*

At this point, after I have sketched the complexity of private law reasoning of succession and slavery, one might be tempted to issue a gentle reminder: in the end, *all* of Tom's children did, in fact, receive his estate by virtue of the state's relinquishment. Some might then accuse me of being overly formalistic: isn't the fact that none of the black family remained enslaved cause for relief, and their receipt of their father's money then practically a cause for celebration?<sup>84</sup>

In fact, the result of the case makes my final point about succession, slavery, private law, and hierarchy. As I have shown, the southern courts had to strike a very delicate balance between articulating respect for property norms and the racial hierarchies of slavery. The result at the end of the case is the final stone that balances the tower. Let's review once more the narrative that the law has told.

Sexual relationships of the enslaved are not to be awarded any of the legal recognition that inures to the same relationships of the free. The *Gardner* rule erects a wall between the intimate lives of the enslaved and the world of market relationships. The *Howard* rule seals it. Legally recognized economic personality is completely foreclosed in family relationships as well as market relations. Wealth is racially ordered in the private as well as public sphere. In the process, the courts articulate a series of justifications that only serve to bolster ideologies of race, status, and sexuality, reinforcing the norms of the sexual economy. Even after manumission, enslavement continues to govern and dictate certain property relationships. Thus the distributive effects and ideological productions of the rules support slavery hierarchies. But what of legal legitimacy and the sense of justice? Formalism by itself can achieve only so much.

But in *Gardner* the court made excellent rhetorical use of the result. “[H]aving no inheritable blood, [Malinda and Sarah] can only take by virtue of the relinquishment made by the State.”<sup>85</sup> As in *Bates*, the result achieved by private law manages simultaneously to affirm the altruism and benevolence of both the law and the group administering it, while reinforcing the point that the objects of that altruism lack a crucial element of legal person-

84. Many readers might have been “rooting” for Malinda and Sarah to be denied inheritable blood and lose, since part of their claim was to enslave the rest of their family.

85. *Malinda & Sarah v. Gardner*, 24 Ala. 719, 725 (1854).

ality: in this case “inheritable blood.” Clemensa was left with merely the dubious consolation of a judicially assumed “natural affection” from her father. Charity, in this case, succeeded by virtue of the “relinquishment of the state.” Thus this is actually the tale of three charities, the third being that of the law itself. Charity, of course, is that which one gives in the absence of legal duty.

### III. TESTAMENTARY TRANSFERS AND THE RHETORICAL STRUCTURE OF HONOR

Thus far, this article has argued that attention to private law doctrine is critical in understanding the sexual and racial economies of the South. But even within private law, the idea of looking at wills seems quixotic at best—at least if one’s concern is partly with the ideological and distributional effects of the law, rather than simply with its documents as the raw material for social history.<sup>86</sup> While people perhaps can envision how interracial sexual unions might result in transfers of wealth between individuals of different races, what do wills have to do with any of this? Wills may be of interest as records of the private affections, transgressions, and revenge impulses of those departed from this life, but most lawyers approach them as a rather dry and dusty part of legal practice, largely a matter of technical competence without larger significance.

The case studies that follow offer a different perspective on wills as documents that at times compelled judges to strike a delicate balance between norms of private property and racial hierarchy. Their presence and their legal resolution thus add yet another dimension to the antebellum sexual economy. Like Part II, this Part gives close attention to the reasoning and language of the opinions, revisits some of the language rendered in *Bates v. Holman*, and examines new cases.

When Elijah Willis died in 1855, he left a will executed in 1854 devising his entire estate to his executors with instructions to emancipate his concubine, Amy, and his children by her in Ohio and to liquidate the remainder of his estate to purchase land and homes for them in a free state. In *Jolliffe v. Fanning & Phillips*,<sup>87</sup> Willis’ brothers-in-law, who had been appointed executors in an earlier will dated 1846, sought a decree to prevent the admission of the second will into probate. They contended that its postmortem transfer of freedom and a substantial amount of wealth violated two provi-

86. Michel Dahlin, Carole Shamma, and Marylynn Salmon note that testators are already a special segment of the population. See SHAMMAS ET AL., *supra* note 6, at 17-18; see also FRIEDMAN, *supra* note 38, at 57-60. Their behavior remains of sociological significance, though, because of their disproportionate impact on the transmission of the nation’s wealth. See SHAMMAS ET AL., *supra* note 6, at 18, 277 n.35.

87. 44 S.C.L. (10 Rich.) 186 (1856).

sions of a state statute, and that, therefore, the entire will was void. In 1841, South Carolina had passed legislation that prohibited testamentary emancipations<sup>88</sup> and devises or bequests to slaves, including those made through trusts.<sup>89</sup> The probate court refused to admit the will, and Jolliffe, the executor of the second will, appealed.<sup>90</sup>

The conflict over Willis' will then returned to the second set of issues raised in *Bates v. Holman* in Part I: to what extent southern judges would uphold testamentary emancipations of enslaved people acknowledged as the concubines and children of slaveholders, and how judicial rhetoric negotiated conflicts between the property right of testamentary freedom and the social norm of racial hierarchy.

#### A. *Testamentary Freedom and Southern Hierarchy*

As the appellate court characterized it, “[appellees] say that the paper in question is void in all its parts, because, first, its provisions show it to be at war with the settled policy of this State as to slavery and emancipation; and, second, those provisions make it void in whole, by virtue of the words of the fourth section of the Act of Assembly.”<sup>91</sup> The South Carolina legislature was soon joined by other southern states in prohibiting testamentary manumissions, the socially preferred form of emancipation,<sup>92</sup> thereby strengthening the state’s assertion of slavery as a public institution.<sup>93</sup>

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88. See *id.* at 194-95.

89. The relevant language of the statute reads:

*Be it enacted*, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payment of debts, or to distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.

Act to Prevent the Emancipation of Slaves, and for Other Purposes (1841), quoted in *Jolliffe*, 44 S.C.L. (10 Rich.) at 190 n.(a). The statute also prohibited investments for the benefit of those enslaved, which the probate judge concluded might have voided Willis’ direction that the estate be used for their benefit, short of their emancipation. *See id.*

90. The actual spelling of the executor’s name is unclear; it appears as both Jolliffe and Joliffe in the reported opinion. *See Jolliffe*, 44 S.C.L. (10 Rich.) at 187 (spelling the name in both ways).

91. *Id.* at 194.

92. “The truth was . . . that *living* masters in all the southern states—even in those which prohibited manumission by last will and testament—always had the right to remove their slaves to a free state and there release them from bondage. Though no slave state could deprive them of this right, few made use of it.” STAMPP, *supra* note 4, at 234-35 (emphasis in original).

93. Between the 1840s and the end of slavery, Mississippi, Georgia, Arkansas, and Alabama enacted similar statutes. *See id.* at 234.

Manumission not only terminated the *property* relationship between master and slave, but imbued the freed person with legal personality, thereby altering his or her relationships with the state and other members of southern society. In some ways, then, it amounted to a privately ordered conferral of legal subjectivity that re-ordered the legal relationships of the manumitted not just with the former master, but with everyone else within society. Intermittently, the southern states asserted the creation of a whole legal personality via manumission as the province of the legislature.<sup>94</sup> Historians have noted the conundrum this posed; as Mark Tushnet says:

[W]e can see an ineradicable tension between the fundamental tenet that the master had an ordinary, and therefore quite powerful, property right in the slave, and the equally fundamental tenet that slaveowners as a class had an interest in perpetuating the institution even in the face of opposition from individuals within that class.<sup>95</sup>

Maintaining the primacy of the master/slave relationship often entailed diminishing the authority that individual slaveholders could exercise over their property.<sup>96</sup>

Manumission also posed a threat to the connection between race and status. Despite the complex genealogies and scopic identities of many slaves and free persons, "Southern law was under great pressure to recognize only two statuses and to identify them with race."<sup>97</sup> As the Supreme Court of North Carolina declared: "It was, indeed, early found in this State, as in most of the others . . . that the third class of free negroes was burdensome as a charge on the community, and, from its general characteristics of idleness and dishonesty, a common nuisance."<sup>98</sup> Legally, whiteness was a defense to being enslaved; not surprisingly, the pure converse that blackness would amount to a presumption of enslavement was a rule operative in every state

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94. See MORRIS, *supra* note 11, at 379 (describing restrictions on testamentary manumission between 1752 and the South Carolina statute in 1841).

95. TUSHNET, *supra* note 1, at 228. Southerners of the period were more blunt. Kenneth Stampp describes "[a] Charleston editor [who] thought it was sheer hypocrisy for an 'old sinner' who had 'enjoyed the profits of the labor of his slaves, during his life time' to emancipate them on his death bed." STAMPP, *supra* note 4, at 234.

96. "So long as individuals are authorized to dispose of their property as they choose, a society runs the risk that an inadequately socialized owner will disrupt the harmonious social relations that should order it." TUSHNET, *supra* note 1, at 188.

97. *Id.* at 203. Eugene Genovese describes differences between a two-caste and three-caste system, which would recognize mulattoes as a class distinct from both blacks and whites. See GENOVESE, *supra* note 10, at 430-31. According to Genovese, the port cities of Charleston, New Orleans, and Mobile more closely approximated the three-caste systems present in Jamaica and Saint-Domingue.

98. Cox v. Williams, 39 N.C. (4 Ired. Eq.) 15, 17 (1845) (adjudicating a trust created to pay for removal of emancipated persons from state), discussed in TUSHNET, *supra* note 1, at 205-06.

except Delaware.<sup>99</sup> The presence and growth of a free black population threatened the equation of blackness with enslavement. Southern whites also feared that a free community of color might lead to collaboration and insurrection,<sup>100</sup> or foment dissatisfaction among slaves, who could see that blackness need not be equated with an existence of degraded servitude.<sup>101</sup> The prohibitions of testamentary manumissions represented one of several devices that states used to minimize the growth of the free colored population.

Southern legislatures also prohibited testamentary transfers of property to slaves either directly or via the creation of a trust. Such postmortem gifts to slaves threatened property and status norms of southern culture. Part II outlined the exclusion of the enslaved from economic personality via common law denial of property rights, including legacies. Use of trusts represented efforts to circumvent these legal and social norms. Significantly, they did so by interfering with the racial descent of wealth ordered by intestate succession. South Carolina's statutory prohibitions clarify southern fears regarding testamentary conferrals of freedom and property.

Other scholars have written excellent accounts of how courts tried to negotiate testamentary manumissions,<sup>102</sup> but they largely have neglected trans-

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99. See *State v. Dillahunt*, 3 Del. (3 Harr.) 551, 551-52 (1840). For a description of how presumptions functioned in different contexts, see, for example, MORRIS, *supra* note 11, at 21-29 and Davis, *supra* note 61.

100. Limiting the free population was of special interest in states such as South Carolina where the slave population far outnumbered the white population, which lived in constant fear of insurrections and revolts. In 1860, enslaved persons (not counting free blacks) comprised 57.2% of the South Carolina population. See KOLCHIN, *supra* note 6, at 100; see also MORRIS, *supra* note 11, at 380 (discussing legal constraints on manumission).

101. Kenneth Stampp's research shows that:

[M]ost masters saw the inconvenience of owning slaves who were nearly white: the presumption of freedom in their favor, and the greater ease with which they could escape. One former bondsman, a "white man with blue eyes," recalled his master's repeated attempts to sell him, always unsuccessful. A Kentucky slave, "owing to his being almost white, and to the consequent facilities of escape," was adjudged to be worth only "half as much as other slaves of the ordinary color and capacities." Here was convincing evidence of the importance of racial visibility in keeping the Negro in bondage.

STAMPP, *supra* note 4, at 196 (quoting 1 HELEN T. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 278 (1926-1937) and BENJAMIN DREW, THE REFUGEE: OR THE NARRATIVES OF FUGITIVE SLAVES IN CANADA 162 (Boston, 1856)) (footnote omitted). In an earlier article, I identify this as a scopic determination of race, as opposed to the more standard genealogical one. See Davis, *supra* note 61, at 704-07.

102. Mark Tushnet and Thomas Morris each offer insightful critiques of testamentary manumissions within broader considerations of the more general tensions posed by manumission doctrine. See MORRIS, *supra* note 11, at 371-423; TUSHNET, *supra* note 1, at 21-23, 191-228. See generally WATSON, *supra* note 11 (offering a comparative approach, emphasizing wealth transfers that accompany emancipation); Arthur F. Howington, "*Not in the Condition of a Horse or an Ox*": *Ford v. Ford, the Law of Testamentary Manumission, and the Tennessee Courts' Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249 (1975) (discussing property and personality components of law of enslavement).

fers such as Willis'.<sup>103</sup> Postmortem emancipations to concubines and offspring by them complicated the more general social threats posed by testamentary emancipation. While all postmortem conveyances of emancipations and wealth to the enslaved affected the racial distribution of individual wealth, wills such as Willis' purported to disinherit white heirs at law in favor of blacks acknowledged as *sexual family*. One might expect that such transfers to a testator's concubine and children by her would pose unique, perhaps heightened, threats to the southern social order.

First, such wills deviated from the social norms of those manumissions that were permitted. Overwhelmingly, slaveholders who emancipated slaves did not free their entire workforce. Most manumissions were of a select few for loyalty or heroic acts.<sup>104</sup> Far from representing ideological condemnations of slavery, such "affectionate" or "heroic" manumissions supported the rhetoric of slavery as a benign institution. Transfers to concubines did not endorse the rhetoric of benevolence for reasons I will explain.

Second, these wills transferred wealth to enslaved women who had been the testators' companions. While the receipt of property is no doubt of secondary importance compared to the receipt of freedom and legal personality, by these actions the slaveholders altered the cultural order that did not distribute a decedent's wealth to his family if his companion suffered from the disability of enslaved status. And because the amounts of the postmortem gifts were often quite significant, the family might gain not only freedom but social status, particularly if they left the community.

Finally, in their public acknowledgment of a slaveholder's sexual, companionate, and filial bonds with the enslaved class, the wills document the testators' deviations from the code of acceptable sexual behavior. Miscegenetic relations largely were tolerated if conducted under an aura of secrecy. While many of the testators adhered to this norm of discretion during their lives, their wills represented postmortem defiance of the racial sexual order.

Willis and other emancipating testators deviated from social norms governing manumission and sexual norms requiring secrecy, discretion, and adherence to intraracial estate distribution. Their wills would appear to create intolerable ruptures in the race and status hierarchies of the sexual economy, and of slavery, more generally. Did they? And how could courts negotiate maintaining racial norms without diminishing testamentary freedom?

As the analysis that follows shows, courts did uphold these claims; as in the *Gardner* case in Part II, this alone is cause for celebration. Yet, by

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103. But see SCHAFER, *supra* note 19, at 180-200 (describing testamentary emancipations between slaveholders and concubines in the context of civil law of Louisiana).

104. See STAMPP, *supra* note 4, at 230. Legislators might independently manumit slaves for heroism. See MORRIS, *supra* note 11, at 379; STAMPP, *supra* note 4, at 233.

probing deeper into the logic and rhetoric of these opinions, this Part uncovers a structure similar to the one that undergirded the doctrine of intestate succession.

### B. *The Rhetorical Structure of Honor*

The court in *Jolliffe v. Fanning & Phillips*<sup>105</sup> rejected the policy charges made by appellees for two primary reasons. First, Willis had taken Amy and his children to Ohio to free them before his death.<sup>106</sup> His inter vivos manumission then superseded the first provision of his will, nullifying its conflict with the South Carolina statute.<sup>107</sup> Second, because his family was free, the trust established by the will on their behalf probably did not violate the fourth provision of the statute. Although the court might have used the inter vivos manumission to diffuse the appearance of conflict between hierarchy and testamentary freedom, Justice Withers' opinion devoted several pages to emphasizing that the invalidity of a single provision of a will does not void the entire document. Defending testamentary authority, even in the face of the 1841 Act, he wrote: "It would, indeed, be most unreasonable to hold that a will should totally fail, in all its studied and benificent [sic] provisions, merely because a small gratuity should be specified for a favorite slave . . ."<sup>108</sup> He continued:

Surely it is enough to subserve any ideas of *policy* or any necessary or reasonable sense of this law, to apply it only to the obnoxious provision, by way of devise or bequest, that the great right of testamentary disposition may not be too boldly invaded; *ut res magis valeat quam pereat*.<sup>109</sup>

The court held that the will should be entered into probate, reserving the separate question of its administration and construction for the probate court.<sup>110</sup>

But one ought not to conclude that the testamentary power triumphed over the southern sexual economy. A further consideration of the reasoning in *Jolliffe*, as well as that in similar cases, shows that the opinions embedded testamentary deference in other rhetoric, and that far from threatening the norms of the sexual economy, the opinions drew from and thereby reinforced those norms.

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105. 44 S.C.L. (10 Rich.) 186 (1856).

106. *See id.* at 195.

107. *See id.* at 197-98.

108. *Id.* at 198.

109. *Id.* That the thing may rather have effect than be destroyed.

110. *See id.* at 193 (stating that the sole question in the case was whether the asserted will should be admitted to probate).

### 1. *Deference and disgust.*

The court in *Jolliffe* rejected both the undue influence and the insanity challenges to the will made by Willis' executors and white heirs. Noting that Willis drafted the will in Ohio in Amy's absence a year before his death, the court concluded that she did not exercise improper influence. Justice Withers' opinion went further, though:

There is no evidence that the testamentary paper was not the free and voluntary act of the testator; nor can the disgust which is properly felt at the course of conduct that supplied the motive to make such provisions as the will contains, in favor of such beneficiaries, be permitted to blind us to the fact, that such motives and such provisions and such objects of bounty were perfectly consistent with the unconstrained pleasure and natural sentiments of such a man as Elijah Willis was.<sup>111</sup>

The court used similar reprobative language to proffer a "rational" explanation for Willis' behavior, which his heirs had alleged to be insanity:

As to the moody silence and reserve; the avoidance of society; a sigh when he beheld the living examples of his shame, and such like exhibitions, reported by certain witnesses, it is most obvious that the more rational his reflections and forecast, when he contemplated the channel through which he must hand down his blood to posterity, and the probable fortune of those who had sprung from him, the deeper must have been his gloom, the more bitter his remorse.<sup>112</sup>

The court thus endorsed deference to Willis' testamentary capacity and authority, but coded it in strong language of disgust and deviance.

As in *Bates*, the court reinscribed Willis' feelings of obligations to his children as ones of "natural sentiments" or affections, while simultaneously classifying those natural sentiments with the animalistic "unconstrained pleasure" of a miscegenetic libertine. It gave legal force to Willis' impulse to provide for his black family, even as it strongly condemned the conduct that motivated him.

Formal deference coded in rhetorical disdain is not unique to the *Jolliffe* opinion. In 1839, the Court of Appeals of South Carolina decided *Farr v. Thompson*,<sup>113</sup> a case with facts very similar to those in *Jolliffe*. A testator sought to emancipate his enslaved son, Henry, to give him property, and to establish a trust for Henry's mother, Fan. Though the judiciary was not yet constrained by the hierarchies codified in the 1841 Act, the court's result and opinion were remarkably similar to the post-1841 case. In responding to the white heirs' allegations of undue influence on a testamentary transfer to a concubine, the court said:

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111. *Id.* at 200.

112. *Id.* at 201.

113. 25 S.C.L. (Chev.) 37 (1839).

This phrase of *undue influence*, so frequently resorted to in this country, by disappointed relations, to avoid wills of persons on whom, while living, they had no claims, seems to me to be a modern innovation, and is not known in the English Courts. Every person of reasonable mind and sane memory may dispose of his property by will. It is a right secured by the municipal law, and exists in as perfect form as the right to transfer by sale or gift during life.<sup>114</sup>

The *Farr* court's defense of the will also positioned the testator's sexual behavior as beyond the pale of decent society.

A disposition of property, though ever so capricious or unreasonable, will not be avoided on that ground alone. It is no lawful objection to a will that it does not dispense the testator's property to his relations, especially remote ones, unless deceitful arts have been used to estrange fixed affections. There is nothing of that kind here, and, *however indecent and degrading was the connection of the testator with his slave*, yet as he had issue by her, whose appearance seemed such as to secure him a *status* in society in another State, which he could not gain here, it is not perceived that there was any thing unreasonable or unworthy in making such a disposition of his property as to promote that end.<sup>115</sup>

From these two South Carolina decisions, one can begin to discern a rhetorical pattern in the concubinage cases.

Ordering the admission of the wills into probate while issuing strong condemnation of the testators' sexual conduct had several effects. First, the decisions projected the deviance of the testators' miscegenistic practices by representing them as egregious breaches of social norms. The opinions thereby supported the projected ideals of the antebellum sexual economy while enforcing its actual norms. Second, the authors of the opinions gained personal and judicial distance from the testators' sexual conduct through their reprobation. At the same time, deference in the face of social misconduct strengthened the image of the sovereignty of the testator over his property. Finally, the feelings that gave rise to the testamentary transfers were pushed into a special, pre-social set of "natural sentiments," laudable in their way, but reflective of charity rooted in animal sympathy rather than ethical duty rooted in law.

The structure of formal deference and rhetorical disgust enabled the legal system to lend its authority to distasteful results while preserving its own legitimacy. "By the 1850s, Southern judges could expect that their published

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114. *Id.* at 46.

115. *Id.* at 48-49 (first emphasis added). Earlier, the court had stated:

We cannot, however, avoid seeing, through the face of the will, that the purpose was to provide a mode of bestowing the property on the issue of an illicit intercourse between that slave and himself. We do not choose here to speak of the indecency of such a connection, nor of the policy of permitting property to be given or devised in trust for the benefit of such persons. Until the Legislature thinks fit to interfere, we must have questions of this sort determined by the established rules of law.

*Id.* at 47. Even the header notes refer to the testator's "disgraceful intimacy" with the concubine. *Id.* at 37.

opinions would be scrutinized by abolitionists eager to find evidence of slavery's inhumanity, and a number of opinions seem aware of that audience.”<sup>116</sup> Adherence to this structure appeared in the earlier Virginia case of *Bates v. Holman*,<sup>117</sup> discussed in Part I. Recall that the judges each gave strong indications that they would have upheld Bates’ testamentary emancipation and property transfer to his enslaved daughter. But Judge Fleming’s opinion also spoke of the testator’s “imprudence,” “unhappy amour,” and “former indiscretion.” Interestingly, in all three cases, *Jolliffe*, *Farr*, and *Bates*, despite resorting to exceptionalism, the courts ultimately were able to restore the testators’ image through other rhetorical devices. Consider the responses to the charges of insanity and undue influence and the judicial rhetoric they generated about both testator and concubine.

## 2. *Obligation and honor.*

In both *Jolliffe* and *Farr*, the executors and white heirs attempted to invalidate the wills by alleging the undue influence exercised by the concubines, Amy and Fan, over the testators. In *Jolliffe*, there was an additional charge of the testator’s insanity. Addressing these charges offered the Court of Appeals of South Carolina yet another rhetorical opportunity.

In *Jolliffe*,<sup>118</sup> the court upheld Willis’ testamentary capacity: “If, as already said, the contents of the will show *nothing inconsistent with such reason and natural emotion* as might control a man in the unhappy and disreputable condition of Willis, it was not insanity in him, to obey their dictates.”<sup>119</sup> Recall that the court had similarly said of the undue influence allegations that “the disgust which is properly felt at the . . . conduct” could not “blind us to the fact, that such motives and such provisions . . . were perfectly consistent with the unconstrained pleasure and *natural sentiments* of such a man as Elijah Willis was.”<sup>120</sup> And earlier, in *Farr*,<sup>121</sup> the court had rejected the undue influence charges by proclaiming there was not anything “*unreasonable or unworthy* in making such a disposition of his property as to promote” the comfort and livelihood of his child “whose appearance seemed such as to secure him a *status* in society in another State, which he could not gain here.”<sup>122</sup> Each of these statements juxtaposed the disdainful disgust of the judicial author against the “naturalness” of providing for one’s family after death.

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116. TUSHNET, *supra* note 1, at 19.

117. 13 Va. (3 Hen. & M.) 502 (1809).

118. *Jolliffe v. Fanning & Phillips*, 44 S.C.L. (10 Rich.) 186 (1856).

119. *Id.* at 200 (emphasis added).

120. *Id.* (emphasis added).

121. *Farr v. Thompson*, 25 S.C.L. (Chev.) 37 (1839).

122. *Id.* at 48-49 (emphasis added).

The language of family and obligation pervades *Bates v. Holman*,<sup>123</sup> as well. Early in the opinion, Judge Fleming's language adheres closely to the rhetorical structure of *Jolliffe* and *Farr*:

[Bates] recognised the *fruit* of his unhappy amour, calling her his daughter *Clemensa*, declared her to be *free*, gave particular directions respecting her education, and made a handsome permanent provision for her, manifesting thereby a laudable instance of natural affection, and making the best atonement in his power, for his former indiscretion.<sup>124</sup>

Judge Fleming's rhetoric is less reprobative than that of his South Carolina brethren for reasons that I will discuss shortly. But the structure of deference and disdain remains. Other portions of Judge Fleming's opinion offer even stronger endorsement for a testamentary emancipation and gift of wealth. Recall that the will emancipating and transferring property to Bates' daughter had been clearly revoked, and that the court turned to it to discern whether Bates had intended to revoke his earlier will.

In deciding that Bates could not possibly have intended to leave the first will operative, Judge Fleming stressed "the moral, as well as natural obligations [Bates] was under, to make ample provisions for his illegitimate daughter, already recognised and emancipated, and for whose welfare and happiness he had shewn very great anxiety and solicitude."<sup>125</sup> Elsewhere, he referred to her as one of "the two worthy objects of his filial and paternal regard and affection; and for whose welfare and happiness he had uniformly shewn the most laudable solicitude."<sup>126</sup> Though the tone of the opinions in *Jolliffe*, *Bates*, and *Farr* differs substantially, each opinion represented the material provisions for the black families as obligatory and "natural." The *Jolliffe* and *Farr* courts disdained these provisions as comprehensible rationality while the *Bates* court sentimentalized them. Judicial deference to such "laudable instance[s] of natural affection"<sup>127</sup> had several effects.

First, obligation and family were two foundational norms that comprised the code of masculinity to which southern men adhered.<sup>128</sup> The courts' ex-

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123. 13 Va. (3 Hen. & M.) 502 (1809).

124. *Id.* at 540-41.

125. *Id.* at 545.

126. *Id.* at 547.

127. *Id.* at 541.

128. On southern honor, see generally EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH (1984), examining structural and cultural influences in the slave South; PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995), investigating ideological dimensions of nineteenth-century southern law to determine the values and norms of the men who held power; JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING (1974), describing effects of honor on early twentieth-century sexual economy of south; MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878 (1980), comparing the early criminal justice systems in Massachusetts and South Caro-

pressions of disgust represent the testators as transgressing southern sexual norms during their lives. But the courts' language of postmortem filial obligation represents them as adhering to parental and familial duty. The testators therefore regain some semblance of operating within cultural sexual norms.

The courts' references to "rational" and "natural" family obligation also erase the nature of the sexual relationships in which the testators were engaged. The rhetoric of filial bonds directs attention away from the sexual economy that produced the relationships. It erases the presence and effects of the sexual and racial norms that make enslaved women's sexuality available for consumption, with or without affection and commitment on the part of the men. Filial obligation projects the benevolence of slavery, paradoxically drawing on its imagery of paternalism and patriarchal domesticity to defeat the claims of white kin.<sup>129</sup> It obscures all of the emancipations that didn't happen.<sup>130</sup> The opinions project a powerful image of interracial family, undistorted by the sexual exploitation and abuse endemic to slavery.

The benign representation of the sexual economy may offer some explanation for the differences in tone between *Bates* on the one hand, and *Farr* and *Jolliffe* on the other. In contrast to the strong rhetoric of disgust in *Jolliffe* and *Farr*, Judge Fleming appeared more forgiving of the testator's transgressions in *Bates*. Consider again the factual differences between *Bates* and the two South Carolina cases to see how *Bates* more neatly fits into projections of deviance and honor.

*Bates* died in his early thirties, having apparently kept secret both his relationship with the unnamed mother and the existence of their daughter. In contrast, the testators in *Jolliffe* and *Farr* were older men whose relationships with their concubines were apparently widely known. *Bates'* behavior could thus be attributed to youthful indiscretion, an apology that southern culture offered for miscegenation between slaveholders and enslaved women. In contrast, as I discuss next, the *indiscretion* and public flaunting by the older testators were part of the challenges to their wills.

In addition, the will itself in *Bates* was not contested. Recall that it was clearly revoked and only relevant to determine whether *Bates* had intended to

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lina; BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH (1982), analyzing the ethical rules of white southern society in the old South; and William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1073-80 (1993), discussing codes of conduct, honor, and Christianity in the antebellum South.

129. One even finds such sentimentalism in later commentators. Historian James Johnston, writing in 1970, proclaimed that "[f]athers of such children would have been inhuman had they not sought to lighten the burden of their children." JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776-1860, at 220 (1970).

130. Eugene Genovese offers this important observation: "But if most of those emancipated originated in miscegenation, most issue from miscegenation did not gain their freedom." GENOVESE, *supra* note 10, at 416.

renounce his first will, an act which would have left him intestate. Therefore there was no reason for any of the heirs to challenge Bates' will, which would have brought the facts more in line with *Jolliffe* and *Farr*. Had they done so, it might have been incumbent on the court to follow more closely the rhetorical structure of those two cases, which enabled upholding the will while withholding judicial endorsement of the conduct. A more skeptical reading of the difference between the *Bates* case and the *Jolliffe* and *Farr* cases would be that because Bates' will was not really subject to being enforced, the court was able to proclaim that it would have been upheld. But the repeated judicial endorsements of its provisions suggest that the court would have enforced it.

Finally, Bates' will did not convey anything to his concubine; only his daughter Clemensa is mentioned in the second will. No reference to her mother is made by any of the parties or judges. There is then no sexual relationship apparent, only a *filial* one. The facts discussed in *Bates*, lacking as they do an illicit, interracial, perhaps coerced, relationship, are thus even more conducive to the rhetoric of honor.

"Deference and disgust" and "honor and obligation" offer complementary images of the sexual economy. The former rhetorical device projects the deviance of this brand of miscegenation; the latter uses the postmortem provisions to strengthen the image of enslaved/master relationships as filial in nature. The testators' behavior appears to be both deviant from and characteristic of southern sexual culture.

This structure has positive effects for the court as well. Even as the opinions used the language of disgust to gain authorial distance from the testators' inter vivos transgressions, their embrace of the rhetoric of honor lent legitimacy to the courts' endorsement of their wills. The courts positioned southern law as refusing to interfere with these fundamental bonds, thereby preserving the appearance of legitimacy and fairness of the legal system.

### 3. *The internal structure of insanity and influence.*

Although the courts portrayed the testators in what at times appear to be contradictory ways, the judicial rhetoric was itself consistent in its adherence to the norms of the sexual economy. One can detect a parallel rhetorical structure in the charges made by the white heirs and the judicial responses to them.

*Gender deviance.* In *Jolliffe*, appellees (the executors of the first will, joined by Willis' white heirs at law) tapped sexual and gender norms in their defense of the invalidity of the will on appeal. Beyond their charge that the emancipatory and trust clauses of the will violated state policy, they alleged insanity and undue influence:

[T]he deceased was often under gloomy depression of spirits—avoiding society on account of his connection with Amy, by whom he had several children; that he permitted her to act as the mistress of his house; to use saucy and improper language; that she was drunken, and probably unfaithful to him; and that she exercised great influence over him in reference to his domestic affairs, and in taking slaves from his business, to make wheels for little wagons for his mulatto children, and in inducing him to take off for sale the negro man who was her husband.<sup>131</sup>

Appellees thereby charged a complex array of breaches by both Amy and Willis of racial codes of gender and sexuality. Their relationship could no longer be confined to the sexual space of the slave quarters; instead, it had spilled over into the house. A variety of female kin might assume the role of plantation mistress to a bachelor or widowed planter, including his mother, daughter, unmarried sister, or mother or sister of his deceased wife. It was socially unacceptable, however, for a black woman ever to be more than a “housekeeper.” Beyond inhabiting a domestic space *racially* coded for white women, Amy also transgressed *gender* norms by interfering with Willis’ business “affairs” and his management of his slaves, a “male” preserve. Ultimately, allegations of “sauciness and inappropriate behavior” might speak to her failure to embody the norms of the polite southern woman mate and the deferential enslaved woman, both roles entailing submission, albeit in different ways.

Likewise, Willis was unable to partake of polite society because his relationship with Amy transgressed the norms of the sexual economy. Their deviation from prescribed roles of master and slave purportedly led to his depression, which appellees argued made him unable to exercise his other property rights, such as the testamentary power.

The earlier *Farr*<sup>132</sup> case followed a similar pattern. The heirs at law alleged that:

Fan had the *influence over [the testator] of a white woman and a wife*. He put his mare to a horse after having refused to do so, because she desired it; had a clock which he cursed, and said he would not have bought it but for Fan; promised to destroy a dog that killed sheep, but did not do it because she objected; bargained for a negro, but would not buy till her pleasure was consulted; sold a negro girl at her desire, and made titles to another one that she offered for sale as her own . . . . The witness thought she had such influence that she could have had any negro sold that she pleased.<sup>133</sup>

The charges alleged the same breaches of gender roles as were made in *Jolliffe*. Like Amy, Fan occupied the inappropriate role of mistress of the house, which the sexual economy reserved for white women. And Fan’s interference with Farr’s business decisions was all the more threatening as it

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131. *Jolliffe v. Fanning & Phillips*, 44 S.C.L. (10 Rich.) 186, 192 (1856).

132. *Farr v. Thompson*, 25 S.C.L. (Chev.) 37 (1839).

133. *Id.* at 41 (emphasis added).

pertained to Farr's management of his slaves, a fundamentally white and male prerogative.

In both cases, the courts rejected these allegations. Responding to the undue influence claim, the court said:

The testimony is wholly silent as to any such influence over Elijah Willis in the matter of his will, unless it can be imputed to the negro woman Amy, *whom he allowed, though his slave, to occupy a level with himself*, and to become the mother of his children, or unless something of that kind can be derived from the provisions of the will.<sup>134</sup>

While rejecting the formal charge, the court agreed that Elijah and Amy had breached the hierarchy of the master/slave relationship. In *Farr*, the court characterized the relationship in the following way: "He had lived for many years in a state of illicit intercourse with a mulatto woman, his own slave, who assumed the position of a wife, and controlled, at least, all the domestic arrangements of his family."<sup>135</sup> Thus the language of both opinions drew on the same set of expectations about racial coding of gender roles. It is unclear which was more offensive to the courts: the transgression of the racial enslaved/master relationship or the transgression of the gendered male/female relationship. I suspect that the effects of each transgression multiplied that of the other.

*Sexual deviance.* In *Jolliffe*, the heirs had alleged Amy's infidelity to the testator. The sexual promiscuity of the concubine was another charge often made in cases of this type.

*Davis v. Calvert*<sup>136</sup> was an 1833 Maryland case with facts similar to those of *Jolliffe* and *Farr*. The testator, Thomas Cramphin, had formed what the court characterized as "an illicit connection and intercourse" with the slave Caroline, and she had "live[d] with him as his mistress" from the time he was seventy-five until his death at the age of ninety-two.<sup>137</sup> At Cramphin's death, he devised Caroline and her children his entire substantial estate. Unlike in *Farr* and *Jolliffe*, Caroline was not enslaved by Cramphin. She was herself enslaved by her white father, George Calvert, and emancipated by him two days before Cramphin's death, thereby enabling her to be a legatee at law.

Following the structure of *Farr* and *Jolliffe*, Cramphin's white kin alleged, among other things, that Caroline and her father had exercised undue influence and undue importunity; Cramphin's kin also questioned Cramphin's capacity. The *Davis* court's decision characterized the heir's charge as follows:

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134. *Jolliffe*, 44 S.C.L. (10 Rich.) at 199 (emphasis added).

135. *Farr*, 25 S.C.L. (Chev.) at 38.

136. 5 G. & J. 269 (Md. 1833).

137. *Id.* at 273.

And the plaintiff further to maintain the issues on her part, offered to prove by competent and credible witnesses, that the said Caroline Calvert, before and until the time she formed such illicit intercourse with said Cramphin, and became his mistress, led a lewd and dissolute life, and was a common prostitute....

The plaintiff then further offered to prove by competent witnesses, that the said Caroline, during the time she so lived with said Cramphin, as his mistress, and whilst he was induced by her to confide in her fidelity to him, indulged herself in secret intrigues and lewd intercourse, unknown to said Cramphin . . .<sup>138</sup>

The heir drew on all of the stereotypes of the enslaved that southern culture projected in order to obscure widespread exploitation of their sexuality. The heir alleged that even as a “kept mistress,” as the court characterized her, Caroline adhered to the imagery of black women as lewd and lascivious.<sup>139</sup> She was portrayed by the heir as promiscuous and deceptive, which the court’s own opinion reinforced. After restating the heir’s allegations, almost word for word, the Maryland court asked:

[A]nd if after that time continuing to live with him as his mistress to the day of his death, and inducing him to confide in her fidelity to him, she continued, unknown to him, to indulge in secret intrigues and lewd intercourse with other persons . . . does it not throw a shade of suspicion over the will, and tend to shed light upon the subject in dispute?<sup>140</sup>

Allegations of Caroline’s lewd behavior amounted to the same charge of role deviation that were made in *Farr* and *Jolliffe*. The sexual economy specifies roles according to race, class, and gender. As the three opinions show, these roles specify both sexual and domestic behavior. Beyond their material consequences on people’s lives, the roles enable the production of rhetoric, by parties to lawsuits, that reinforces the power of those very stereotypes.

*Barbarism and seduction.* Intriguingly, the structure of the charges in these cases provides an intriguing reflection of the perception of threat. In *Davis v. Calvert*, the white collateral heir alleged that the testator lacked capacity to author a valid will due to insanity, and that the beneficiaries of the will, Caroline and the children, had exercised undue influence. Initially, allegations of insanity and undue influence might seem either disconnected or mutually exclusive. In fact, both rely on the same projections of racialized sexuality and gender roles identified in the passages from the opinions.

The heirs claimed that Cramphin was incompetent, based in part on his disinheritance of them in favor of a black, enslaved woman. Their articulations of his deviation from expected racial roles is telling. Who would live with a black woman, unless of unsound mind? (The subtext is that one could

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138. *Id.* at 274.

139. *See id.* at 308-09.

140. *Id.* at 309.

avail oneself of sexual pleasure with enslaved women without entailing social reprobation). Who would give up social standing to live with one so lewd, so hideous, so barbaric? The heir drew on justifications articulated by the South as to why enslaved women's sexuality need not garner the same legal and cultural protections awarded to white women.

But consider the accompanying allegation of undue influence. The heir claimed that Caroline's sexual promiscuity and infidelity extended to deceiving the testator about his paternity of the children.

The plaintiff further offered to prove by competent witnesses, that the said children mentioned in said supposed will, were falsely, artfully and deceitfully, and by the undue and overweening influence, and dominion of said Caroline over the mind of said Cramphin, imposed on him as his children, when in fact they were not his, but the spurious fruits, and issue of her secret and lewd amours with other persons.<sup>141</sup>

This imagery represents Caroline as the antithesis of hideous and barbaric; rather, she is now cast as an irresistible siren. Or, in the following quotation, what one might call a succubus: "The deceased is aged, infirm, and credulous; he is in the hands of a woman who has indeed 'taken possession of him, and subdued him to her purpose.'"<sup>142</sup> She used her irresistible sexual charms to embrace Cramphin, sucking from him what amounts to "inheritable blood," as it were.

Similarly, in *Farr*, the heirs' charges (incorporated again in the court's opinion) included numerous references to Fan's violent, coercive behavior that breached all notions of southern femininity.

[S]he shook her fist in his face and threatened to knock his teeth down his throat; witness heard them quarrel in the night; heard her call Hannah, a servant, to bring her the whip, and she'd beat his skin off.

They would get drunk together, and she was insolent to him; told him to hush, or she'd give him hell; cursed him for a damned rascal, rubbed her fist in his face and dared him to open his mouth; called him a damned old palsied rascal.<sup>143</sup>

They accused her of having thrown a spear at him, and that a friend had wanted to beat her, but testator refused to permit it.<sup>144</sup> The allegations in *Farr* (and again, their repetition by the court) inscribed notions of black barbarism similar to those ascribed in *Davis v. Calvert*. Thus, the parties to the case, too, have a part to play in producing and reproducing the norms of the sexual economy. Much like the viewing of pornography before it is condemned, the repetition of the charges as the courts reject them titillated the

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141. *Id.* at 274.

142. *Id.* at 283 (quoting 1 Cox's Ch. Cas. 354).

143. *Farr v. Thompson*, 25 S.C.L. (Chev.) 37, 41 (1839).

144. See *id.* at 42.

audience, continuing to confine the women to the sexual roles they had been forced to inhabit in their enslavement.

### C. Status and Supplication

Despite the doctrinal differences between testamentary transfers and intestate succession, the outcomes of the case studies I have done in this Part are remarkably similar. Malinda, Sarah, Organ, Miles, and Rebecca each received part of their fathers' estates *not* by virtue of legal right, but by state charity. The state's *moral* obligation, not their fathers' legal one, is the reason for their receipt of the wealth. They were the recipients of state charity, and were not participants in "lineal glory."<sup>145</sup> Similarly, because of the mechanics of the testamentary power, at the death of their companions, Fan and Caroline appeared in the legal system seeking beneficence and charity from both the court and the testators.

Technically, it is the executor who ensures the enforcement of a will. The theory behind wills is to give force to the *power of the testator* to direct the disposition of his property after his death.<sup>146</sup> The author of a valid will exercises testamentary freedom as an autonomous, respected individual—a sovereign rights-holder. Until his death, he is free to revoke the will for any reason and without disclosure, as Bates did.<sup>147</sup> On the other side is the recipient of his generosity, appropriately labeled at law as the *beneficiary* of his will. As a technical and a rhetorical matter, the enforcement of a will is not construed as protecting any rights of those to whom the testator directed his estate. As with Malinda and Sarah in *Gardner*, Fan and Caroline and their children in *Farr* and *Davis* could not assert a claim stemming from dower or inheritance, recognized property rights. Instead, they had to hope that the courts, in their racial charity, would give force to the personal charity of their testators.

And so what of the rhetoric of honor? How does filial obligation appear now? Consider the difference in outcome between *Farr* and *Davis* on the one hand and *Jolliffe* on the other. In *Jolliffe*, despite the will that purported to emancipate Amy and her child, the testator had already freed the family by

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145. See SHAMMAS ET AL., *supra* note 6, at 10.

146. I purposely use the male pronoun in describing authors of wills. Through the nineteenth century, wills were overwhelmingly made by men, for reasons of law and society. *See, e.g.*, *id.* at 103-22 (describing the percentage of testators who were women in Bucks County, Pennsylvania during this period). Men owned or controlled close to all wealth, and until the passage of the Married Women's Property Acts and other statutory reform after 1850, marriage prevented the majority of women from making wills. *See, e.g.*, Chused, *supra* note 24, at 1361 (noting that a married woman's property was subject to her husband's management and control); Fellows, *supra* note 8, at 138 (describing the inability of women to write wills prior to the nineteenth century).

147. Although, like Bates, he may find his intent in question during probate unless he leaves clear indications of revocation. *Cf.* Bates v. Holman, 13 Va. (3 Hen. & M.) 502, 502 (1809).

taking them to Ohio.<sup>148</sup> He had enacted an *inter vivos* manumission that, unlike a testamentary emancipation, left his family free at his death. As Mark Tushnet notes: “[A] master might find his or her most carefully structured will destroyed by the use of one of the doctrines floating throughout the South, but nothing could prevent a predeath manumission, carried out by sending the slaves to a free state.”<sup>149</sup> Why then didn’t the testators in *Farr* and *Davis* perform the same simple act? Wouldn’t that have been the truly honorable and “laudable” thing to do?

The differences between *Farr* and *Davis* on the one hand and *Jolliffe* on the other suggest the effects of revocability. I do not mean in any way to suggest that the concubines entered sexual relationships with the testators in order to gain wealth. Rather, I suspect that if they entertained any hopes at all beyond the immediate escape from the perils suffered by many, it was the hope of freedom, for themselves and their children. But the complete revocability of the wills left the women without any assurances, despite promises that might have been made, implicitly or explicitly. Instead, their future was contingent on their continuing to please the men who enslaved them, and was defined by him daily. Indeed, the antebellum South had a level of tolerance, some would say a fondness, for illicit sexual relationships that maintained the power imbalance between the enslaved and the master.<sup>150</sup> Thus, the doctrine of testamentary transfer in this context secures the performance of the erotics of submission with the romance of domination—without the corresponding material obligation to which those defined as “wives” can at least lay claim.<sup>151</sup>

The technical doctrine and judicial rhetoric of interpreting wills, revocability, gift-giving, and testamentary freedom conspired to maintain concubines within a legal structure acceptable to antebellum culture, even if the daily lives of the couple had breached it. At his death, she was returned to the status of supplicant, no different from the children of Tom, left to negotiate the same rhetorical and material structures that had justified their enslavement.

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148. See text accompanying note 106 *supra*.

149. TUSHNET, *supra* note 1, at 228.

150. Correspondingly, those who deviated became social outcasts. Catherine Clinton describes scandals over public and open relationships with black mistresses. Vice-President Richard Johnson suffered the end of his political career because of his open relationship with a *free woman of color* and acknowledgment of their children. See CATHERINE CLINTON, THE PLANTATION MISTRESS: WOMAN'S WORLD IN THE OLD SOUTH 214-17 (1982).

151. Patricia Hill Collins notes that domination often combines with real affection. See 2 HILL COLLINS, *supra* note 20, at 174. Although affection may soften the effects, it does not erase the presence of the domination.

What emerges is the social significance underlying various modes of transfer that were consonant with social meanings and cultural norms.<sup>152</sup> Ultimately, by choosing wills over *inter vivos* manumission, the men played out a private version of what law secured in its denial of entitlements.

#### D. Summary: Compliance and Submission

Transfers of property by wealthy white men to black concubines facially might appear to be beneficent, counter-cultural moves. Upholding testamentary rights of male slaveholders fails to challenge race or gender hierarchies. Rather, the rhetorical structure of honor offers a framework for mediating what seem to be testamentary transgressions without destabilizing the fundamental racial structure of the community.<sup>153</sup> The social shaming ritual and the language of sentiment together enabled law to negotiate a delicate balance between sexual and market relations. They create the illusion of antebellum filial obligation and deviance, representing the women as supplicants and succubi. This structure renders these testamentary documents another coercive tool for securing compliance and submission.

The rhetorical framework of testamentary transfer and the structure of private law governing intestate succession were both fully consonant with the sexual economy. Together they demonstrate how property frameworks may operate to endorse and reinforce cultural ideology. Property relationships are a key way of establishing and maintaining social and political power. These frameworks of private law doctrine enable courts to perform complex negotiations of race, sex, and property norms while maintaining legal legitimacy. In light of the embedded contradictions of the antebellum sexual economy, deference to the testamentary power might better be under-

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152. Louisiana, for instance, had its own distinctive sexual economy of slavery that was consonant with its more liberal attitudes toward sexuality and the ideology of a civil law system. Judith Kelleher Schafer gives an excellent account of the functioning of the Louisiana economy. *See SCHAFER, supra* note 19. She labels situations that parallel the common law ones that I describe here as “open and notorious concubinage.” *Id.* at 180-200. Still, one can identify a structure of power and property within the Louisiana system’s apparently greater tolerance for public relationships. For instance, under Louisiana law, concubines, regardless of race, could receive 10% of the value of the estate of a lover. *See id.* at 185. While this may sound positively progressive in light of the private common law that I have sketched, in fact, it yielded its own traps around characterizing enslaved women’s status. *See id.* at 199-200 (noting that Louisiana’s laws were more burdensome on slave concubines).

Louisiana law also said that an emancipation amounted to a gift to a slave of her value. Thus, when a testator directed a testamentary emancipation of an enslaved woman, if her market value was more than 10% of the estate, excluding any other transfers of wealth, collateral heirs could defeat the emancipatory provision. *See id.* at 185. Such a rule clearly gave an incentive to heirs to allege sexual relationships, in order to bring the will under the rule limiting donations to concubines. For a detailed discussion of Louisiana civil law doctrine, see generally *id.*

153. In contrast to the framework of bourgeois law that Tushnet argues created doctrinal and ideological tensions for a slave culture, the structure of honor is quintessentially southern. It draws from, and reproduces, the norms of the antebellum society. *See generally TUSHNET, supra* note 1.

stood as a safety valve for the pressure system of the sexual and racial economies.

#### IV. THE POSTBELLUM WORLD

This article has attempted to show the distributional and ideological effects of the private law of succession doctrine in the antebellum era. I hope that my reading of these contested distributions of estates has deepened understanding of the role of private law in structuring the antebellum sexual economy. Readers may concur with my reading of the case studies, but anticipate that the end of slavery saw the demise of intricate dances around testamentary manumissions of concubines and *Gardner*-like rules. One might be tempted to conclude that these private law frameworks, embedded as they were in the rules of status, would have become legally and sociologically irrelevant, an interesting relic of an embarrassing legal past.

Moreover, one might discount the relative import of inheritance law to black Americans following universal emancipation after the Civil War. In light of the other questions of legal personality that were on the table following universal emancipation, would blacks not perceive securing rights to the franchise, education, police protection, and markets as of more immediate and material importance than gaining inheritance rights to transmit wealth they didn't have?

As the following section shows, both southern states and black Americans identified the legal assignation of rights to black companionate relationships as of pressing importance, albeit for different reasons.<sup>154</sup> Left with a legacy of succession doctrine formulated under slavery, southern courts struggled to reconcile its logic with the emerging norms of (facial) racial equality.<sup>155</sup> By deriving the private law of estates in the postbellum era and its effects, I hope to raise the question of the extent to which the norms of the antebellum sexual economy were truly eroded by the end of slavery. I also hope to show the ongoing relevance of private law to racial (and gender) equality.

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154. See Edwards, *supra* note 46, at 90-91 (discussing legalization of slave unions during the Civil War and prominence of issue at North Carolina's 1865 constitutional convention); see also GROSSBERG, *supra* note 27, at 133-36 (describing state debates over and resolution of question of legal characterization). In 1866, over 9,000 black couples in seventeen North Carolina counties sought legal recognition of their relationships. *See id.* at 134.

155. Several of the cases that I survey overlap with research done by historian Mary Frances Berry on legal formalism in the Reconstruction and post-Reconstruction southern courts. *See generally* Berry, *supra* note 46. Berry examines 27 interracial inheritance disputes decided by southern courts between 1868 and 1900. *See id.* at 842-47. She identifies the shifting structures of legal logic between the Reconstruction and post-Reconstruction eras. Berry's research offers rich insights into structure of legal thought as represented in judicial reasoning. She does not, however, draw doctrinal distinctions between black claims predicated on *entitlements as heirs* and those seeking to enforce *testamentary transfers as beneficiaries*.

### A. *Intestate Succession and Legitimacy*

Following Emancipation, blacks struggled to gain full legal personality.<sup>156</sup> They defined this not only as political personality, but also as economic personality<sup>157</sup> and personal autonomy (or what today we might call privacy rights).<sup>158</sup> In a variety of cases that I will describe, the formerly enslaved sought to gain legal recognition of property relationships in their intimate lives, thereby challenging the slave law's denial of economic personality in this arena. "Not only did they believe in matrimony, they also wanted to fortify their domestic relationships with as many legal protections as possible."<sup>159</sup> For blacks, an important indication of full citizenship status was the legal recognition of family relationships.

Meanwhile, the southern states had their own concerns about the property relationships in force in black sexual families. Following Emancipation and enactment of the Civil Rights Act of 1866, blacks could not be denied the right to own property or make contracts.<sup>160</sup> But, the question of the postmortem transmission of any property rights remained vexing. Denied the clarity of succession doctrine, black families in which one or both of the parents had been enslaved increasingly confronted the uncertainty of estate transmission. And southern courts increasingly confronted clouds on legal titles stemming from the disarray of black succession chains.

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156. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 77-123 (1988) (describing the desire by free blacks for autonomy as individuals and as members of their communities); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 227-322 (5th ed. 1980) (discussing the economic, political, and social developments following Emancipation); HIGGINBOTHAM, *supra* note 60, at 75-118 (describing the judicial and political betrayal of freed slaves who sought protection of their citizenship rights).

157. Patricia Williams explained the significance of formulating their place in the market: "After the Civil War, when slaves were unowned—I hesitate to use the word emancipated—they were also disowned. They were thrust out of the market and into a nowhere land, which was not quite the mainstream labor market and was very much outside the marketplace of rights." Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81, 83-84 (1990).

158. Recall that blacks had always had "criminal personality" in the context of capacity to commit crimes. See TUSHNET, *supra* note 1, at 122-39 (describing how slave law dealt with criminal behavior).

159. GROSSBERG, *supra* note 27, at 133.

160. Section 1 of the Civil Rights Act of 1866 provides:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws . . . as is enjoyed by white citizens . . .*

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

In *Butler v. Butler*,<sup>161</sup> the validity of a lease and mortgages turned on the determination of black inheritance rights. The intestate, Allen Butler, had fathered two families. While enslaved, he formed a union with Mary Ann, which lasted ten years. However, the union, being terminated by his sale, did not survive his emancipation.<sup>162</sup> Subsequently, Butler married Mariah Conway, with whom he lived for forty years until his death. Each of the surviving families (Mary Ann and Mariah and her children) claimed succession rights and, thereby, the ability to enforce conveyances they had made. Similarly, in *Lewis v. King*,<sup>163</sup> an intestate's second companion, Mary Baker, claimed that she was entitled to the entirety of his estate, which she had encumbered by lease and conveyance. She argued that intestate's children and grand-children from a previous relationship had no inheritance rights, by virtue of being born while the intestate remained enslaved.

A second, related question pertained to the state's liability for children whom it defined as illegitimate and hence unable to make claims upon the estates of their fathers. The legitimacy of enslaved children had not affected the state, as their sole legally recognized relationship was with the master who enslaved them. But free black children, born out of wedlock, were able to make claims upon the public for support.<sup>164</sup> While such claims were minimal, in the aggregate, the southern states confronted assuming financial responsibility for the overwhelming majority of black children.

Thus, the question of "inheritable blood" took on new significance in the postbellum period. Pure antebellum doctrine, which had maintained the hierarchies of slavery, now threatened the integrity of property titles in the southern states. Revisiting the impact of enslavement on "inheritable blood" placed considerable pressure on the old rules and doctrinal axes, identifying various points of vulnerability of the private law framework. For instance, Laura Edwards emphasizes the impact on marriage:

Before the Civil War, both marriage and slavery created the boundaries that separated the household from the state and located people on either side of that divide as dependents or household heads. With the abolition of slavery, mar-

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161. 44 N.E. 203 (Ill. 1896).

162. The court puts this somewhat cryptically: "They lived together in Maryland as husband and wife until he left the state in 1851 . . ." *Id.* at 203. Only subsequently does it becomes clear that it was *Allen's sale* that ended the relationship. See *id.* The judge (probably unconsciously) ascribes the termination of the relationship to Allen, as opposed to the whims of individual whites influenced by personal circumstances and market forces. It thereby obscures the force of slavery—and slave law—in creating the very circumstances destabilizing the property system.

163. 54 N.E. 330 (Ill. 1899).

164. See Edwards, *supra* note 46, at 86 (noting that illegitimate children became wards of the state).

riage acquired even greater importance in structuring southern society because it was now the only institution that legally constituted households.<sup>165</sup>

The remainder of this article shows how southern courts attempted to stabilize the antebellum frameworks without the doctrinal axis of slavery.

### 1. *Retroactive ratification of “marriages.”*

Antebellum law had generated two doctrinal approaches to resolving the question of the effects of enslaved status on the economic rights of sexual families. *Howard v. Howard*<sup>166</sup> embodies the most rigid rule: “[N]o ground can be conceived of, upon which the fact of emancipation can, not only draw after it the qualified relation, but by a sort of magic, convert it into a relation of so different a nature.”<sup>167</sup> Enslavement was completely incompatible with civil rights. *Gardner*, on the other hand, endorsed a more flexible approach under which rights could be “earned” for permanence. Rights lay dormant, ripening into legal fruition if the relationship survived emancipation.

In the aftermath of slavery, the entire southern legal system universalized and formalized the dormancy approach by authorizing, and in some states, requiring, the retroactive ratification of the relationships of the formerly enslaved as legal marriages with concomitant rights and obligations.<sup>168</sup> Some states codified this approach in legislative enactments; others included it in their constitutional provisions; and, in some states, courts were the engine of ratification. Courts indulged wholesale in the legal fiction underlying dormancy doctrine that they could conduct coherent inquiries into the permanence and stability of relationships that law had defined as transitional and unstable. Significantly, these statutes legitimized the children born of these unions, thereby terminating claims they might have been able to make against the state for support. Others have noted the disciplinary effects of these statutes on black sexual relationships, exposing the newly freed to prosecutions for bigamy, adultery, and fornication, and accompanied by cultural condemnations of promiscuity and uncivilized behavior.<sup>169</sup>

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165. *Id.* at 85 (footnote omitted). Similarly, Emily Van Tassel says: “When slavery had provided a (deceptively) coherent legal category, racial ideology functioned to support and explain the category.” Van Tassel, *supra* note 15, at 875.

166. 51 N.C. (6 Jones) 235 (1858).

167. *Id.* at 239-40.

168. See, e.g., GROSSBERG, *supra* note 27, at 133-36 (discussing provisions by southern states that conferred formal legitimacy on relationships begun in slavery); see also Edwards, *supra* note 46, at 95-96 (discussing North Carolina’s fiction of dormancy).

169. See, e.g., GROSSBERG, *supra* note 27, at 135-36 (describing the judiciary’s paternalistic concern about black sexuality in upholding the legality of slave unions); Edwards, *supra* note 46, at 100 (“[A]frican Americans saw the importance of marriage as an institution that entailed public rights as well as private obligations.”); Franke, *supra* note 46. See generally CLAUDIA TATE, DOMESTIC ALLEGORIES OF POLITICAL DESIRE: THE BLACK HEROINE’S TEXT AT THE TURN OF THE CENTURY (1992) (distilling from fiction social meaning of marriage to blacks during this period);

Even once dormancy was adopted as the rule, the process of ratification posed tensions between the continuity of legal rules that had been enunciated in the antebellum era and the new norms of facial racial equality and orderly property succession. The *Gardner* rule had proclaimed that relationships of the enslaved *had to survive* emancipation in order to yield legal rights. But many of the companionate relationships of the enslaved had not, of course, survived until 1863, due to death, forced separation by sale, or the decision of one or both of the parties. How were these relationships to be treated? A pure dormancy approach would dictate that they must be declared invalid. On the other hand, such a ruling would leave a chaotic title situation and massive illegitimacy.<sup>170</sup>

In 1870, the Supreme Court of Alabama revisited the *Gardner* decision. In *Stikes v. Swanson*,<sup>171</sup> the court declared: "Marriage is undoubtedly a natural right, and slavery did not deprive the man in this condition of all his natural rights."<sup>172</sup> In contrast to the latinate *contubernium*<sup>173</sup> that had rendered the companionate relationships of the enslaved simultaneously exotic and too trivial for legal recognition, the Alabama court now labeled them "quasi marriages."<sup>174</sup> Following the logic of the new definition, the children of the enslaved had never been illegitimate, only awaiting legal recognition. The decision overturned *Gardner*, declaring that "Emancipation has restored the former slave to his natural rights" and "has restored [his] heritable blood."<sup>175</sup> Beyond changing the distributive effects by adopting a more expansive definition of "dormancy," the court restated the legal logic of the antebellum rule. In contrast to the earlier decision, the dormancy of conjugal and filial legal relationships was now ascribed to the *denial by the state*, as opposed to the *insufficiency or incapacity of the enslaved*.

Six years later, in *Cantelou v. Doe*,<sup>176</sup> Alabama terminated the short run of the "quasi-marriage" rule, reinstituting the pure dormancy rule of *Gardner*. Overturning *Stikes*, the court declared that the Alabama ratification statute "did not, and could not, legitimate the offspring of the earlier and discontinued cohabitation, or impart to them the capacity to inherit from him."<sup>177</sup> Alabama's legal flip-flop between dormancy and quasi-marriage in

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Van Tassel, *supra* note 15 (describing the concern with interracial marriages following the abolition of slavery).

170. This question might be thought of as a variant of the angels on the head of a pin inquiry, the postbellum equivalent of whether testamentary manumissions pertained to unborn children, as dealt with by the court in *Howard*. See *Howard v. Howard*, 51 N.C. (6 Jones) 235, 235 (1858).

171. 44 Ala. 633 (1870).

172. *Id.* at 636.

173. See text accompanying note 73 *supra*.

174. *Stikes*, 44 Ala. at 635.

175. *Id.* at 637.

176. 56 Ala. 519 (1876).

177. *Id.* at 522.

the span of fifteen years illustrates the tensions postbellum doctrine encountered in trying to craft succession doctrine that would meet both material and ideological needs.

The final embrace by southern courts of the dormancy rule brought closure to the specific question of relationships *between* blacks, but it did not resolve the question of how to deal with the assignment of legal rights to *interracial* relationships. The following cases illustrate the problems.

## 2. *Interracial marriages.*

Immediately following the end of the war, all of the southern states passed anti-miscegenation legislation.<sup>178</sup> Those states that had not explicitly prohibited interracial marriages in the antebellum period now did so; those that had previously done so strengthened their statutes, enhancing penalties and broadening the scope of prosecution.<sup>179</sup> These statutes were challenged on the grounds that they violated the federal Civil Rights Act of 1866, which declared that blacks and whites would have equal rights to make and enforce contracts.<sup>180</sup> Here, southern courts confronted a more serious dilemma than the revising of dormancy doctrine. Southern courts had justified denial of legal rights of marriage to the enslaved because of inability to contract, a rationale which appeared in stronger and weaker forms in *Howard* and *Gardner*, respectively. But the federal bill enabling racially equal rights of contract then would have appeared to secure the right to marry one of a different race.<sup>181</sup>

Instead, the southern courts altered the doctrinal interplay of the marriage and contract axes within the private law framework. In *Green v. State*,<sup>182</sup> the Supreme Court of Alabama's rhetorical framing suggests the

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178. Mary Frances Berry and Michael Grossberg each offer excellent summaries of the legislation prohibiting interracial marriage and interracial sex. See Berry, *supra* note 46, at 839-40; GROSSBERG, *supra* note 27, at 136-40.

179. See, e.g., Van Tassel, *supra* note 15, at 900-904 (describing enhanced penalties and broader scope of laws and legislative debates about miscegenation).

180. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

181. In fact, President Andrew Jackson justified his veto of the bill on just these grounds: "[I]f Congress can abrogate all state laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally, may it not also repeal the State laws as to the contract of marriage between the two races?" GROSSBERG, *supra* note 27, at 136. As Emily Field Van Tassel notes: "Interracial marriage, and the social equality it was made to represent, was used to forestall access by Blacks to a whole range of public rights and privileges, because such access, according to its opponents' beliefs, must ultimately lead to interracial marriage." Van Tassel, *supra* note 15, at 877. For a summary of twentieth-century regulation, see generally Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996) and Deborah Lynn Kitchen, *Interracial Marriage in the United States, 1900-1980* (1993) (unpublished Ph.D. dissertation, University of Minnesota) (on file with the Stanford Law Review).

182. 58 Ala. 190 (1877).

resolution: "Is marriage . . . nothing more than a civil contract?"<sup>183</sup> Deviating from its earlier marriage-as-contract logic in *Gardner*, Alabama joined the other southern courts in concluding that the civil rights bill did not apply to the anti-miscegenation statutes.<sup>184</sup>

Most intriguing is the resolution offered by the Supreme Court of North Carolina, which had embraced the stronger version of marriage-as-contract in *Howard*, declaring that "in our courts, marriage is treated as a mere civil institution."<sup>185</sup> In *State v. Hairston*,<sup>186</sup> the court said:

The marriage relation is a peculiar and important one. The courts treat it as a contract only in the sense that contract—consent of parties—precedes it and is essential to its validity. But, when formed, it is more than a civil contract; it is a *relation*, an *institution*, affecting not merely the parties, like business contracts, but offspring particularly, and society generally.<sup>187</sup>

In the postbellum world, the Supreme Court of North Carolina appeared less troubled by the implications of a "fanciful conceit."<sup>188</sup> Under the threat of interracial marriage, the marriage-as-contract approach gave way to an articulation of marriage as a social institution.

Interestingly, the efforts of the judges to distinguish marriage from the protected class of contracts resulted in contradictory rhetoric.<sup>189</sup> As the language above emphasizes, marriage is a social institution of greater significance than commercial agreements; the contractual element is only a matter of form. On the other hand, as the Alabama court stressed in *Green*: "The amendments to the Constitution were evidently designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of purely domestic nature. The regulation of these belongs to the States."<sup>190</sup> *Green* suggests that marriage is in the domestic arena, outside of the protected market or political spheres. These opinions then represent marriage as both more than and less than a contract.

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183. *Id.* at 193.

184. See, e.g., *State v. Gibson*, 36 Ind. 389 (1871); *State v. Jackson*, 80 Mo. 175 (1883); *Lonas v. State*, 50 Tenn. (3 Heisk.) 287 (1871).

185. *Howard v. Howard*, 51 N.C. (6 Jones) 235, 239 (1858).

186. 63 N.C. 451 (1869).

187. *Id.* at 453.

188. *Howard*, 51 N.C. (6 Jones) at 239.

189. See also *Berry*, *supra* note 46, at 840 (noting divergences in how contract rationale was applied in interracial marriage cases and bigamy prosecutions).

190. *Green v. State*, 58 Ala. 190, 196 (1877) (emphasis added). Similarly, the North Carolina court states: "[N]either the Civil Rights Bill nor our State Constitution was intended to enforce social equality, but only civil and political rights." *Hairston*, 63 N.C. at 453.

### 3. Ratification of interracial "marriages."

The final inquiry occurs at the cusp of the ratification and anti-miscegenation doctrines. If the ratification doctrine declared companionate relationships of the enslaved to be marriages for the purposes of estate distribution, what impact would this have on *Bates-* and *Jolliffe-* type relationships between slaveholders and concubines? One would expect that southern law would have exempted these relationships from the operation of the ratification doctrine, which clearly did not contemplate that black women would become entitled to the wealth of the planter class by virtue of concubinage under slavery. But a pair of Texas cases demonstrates how the particular wording of the Texas constitution exposed that state's legal and economic system to interracial claims predicated on ratification.

The 1869 Texas Constitution stated:

All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate.<sup>191</sup>

In *Honey v. Clark*,<sup>192</sup> three children of a relationship between a planter and his enslaved concubine claimed the benefits of the constitutional provision, arguing that they were entitled to the intestate succession of their father's \$500,000 estate, which had escheated to the state for failure of heirs. The Supreme Court of Texas had to determine whether the children had been legitimized by operation of the provision.

The court found that John Clark had cohabited with Sobrina from the time he purchased her in the early 1830s until his death in 1862, and that her children were his offspring. Reminiscent of the role transgression testimony in the antebellum cases, witnesses testified that "Clark and Sobrina habitually occupied the same bed, and ate at the same table; that Sobrina carried the keys and exercised the authority of mistress of the house."<sup>193</sup> The court framed and answered the legitimization question as follows:

The section under consideration was intended to legalize the marriage of certain persons, and legitimate their offspring; and the inquiry arises, who are such persons and such offspring? We answer, the persons are those who live together as husband and wife, and who, by law, were precluded the rights of matrimony. The law and the evidence show that John C. Clark and Sobrina were precisely such persons.<sup>194</sup>

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191. TEX. CONST. of 1869, art. XII, § 27.

192. 37 Tex. 686 (1872-1873).

193. *Id.* at 688.

194. *Id.* at 709.

The court awarded Clark's estate to his children, voiding the previous escheat.

Following Alabama's pattern in *Stikes* and *Cantelou*, the Texas court closed the rupture that *Honey* had created in southern hierarchy a mere two years later in *Clements v. Crawford*.<sup>195</sup> In this case, Mary Clements, "a mulatto woman,"<sup>196</sup> and George Clements, a white man, asserted the protection of the constitutional ratification provision as a defense to a seizure of George Clements' property. The couple claimed that ratification of their relationship vested Mary with homestead rights, which George could not defeat by conveying a deed of trust. The arguments parallel those made in *Free Frank & Lucy*<sup>197</sup> and *Commonwealth ex rel. Stephens*,<sup>198</sup> discussed in Part II, in which black families sought marital recognition to gain the protections offered by the *disabilities of coverture*.

In *Clements*, the Supreme Court of Texas proffered an interpretation of the ratification provision far more limited than the one it had two years earlier.

[The provision] refers only to those persons who were both precluded, not from intermarriage with each other merely, but from marriage with any one else. Its object was to legitimate the offspring of those whose bondage had disabled them from legal marriage, but who had lived together recognizing each other as husband and wife, until the death of one of them, or until the adoption of the Constitution. In the connection of such persons there had been no violation of either law or good morals. A free white man, precluded by no law from marriage, who was living with a woman either white or black, in violation of the law, at the time of the adoption of the Constitution, was not thereby made a married man. It is not the letter of the Constitution, nor is it believed to be its intention, to confer on any parties, white or black, whose intercourse was illegal and immoral, the rights and benefits of lawful wedlock.<sup>199</sup>

This decision explicitly overruled the *Honey* decision and its embrace of broad interpretive principles. As in the *Stikes/Cantelou* chronology, the property distribution enabled by broad, Reconstruction-era statutes gave way to narrower interpretations that re-implemented antebellum racial and sexual economic norms.

#### 4. Summary.

In the postbellum era, competing needs to clarify black property titles and maintain norms of race and property ownership placed increasing pressure on the private law matrix of inheritance and succession. Ensuring or-

195. 42 Tex. 601 (1875).

196. *Id.* at 602.

197. 15 Ky. (5 Litt.) 330 (1824).

198. 6 Binn. 206 (Pa. 1814).

199. *Clements*, 42 Tex. at 603-04.

derly descent of black estates and disciplining blacks into nuclear family structures required the wholesale ratification of all companionate relationships disabled under enslavement, and the legitimization of the offspring. The purely marriage-as-contract, anti-dormancy rule of *Howard* eventually was universally rejected across the South. In *Stikes*, Alabama adopted for a short time a broad interpretation of the meaning of dormancy, altering in the process not only postbellum property rights but antebellum rationales. The rhetorical shifts implemented by a Reconstruction court in *Stikes* were ultimately rejected in *Cantelou*, and the version of dormancy articulated in *Gardner* under slavery was reinstated.

The threat of interracial marriage pressed contract doctrine from a different angle. Southern courts uniformly rejected the contract rationale for prohibiting enslaved marriages, and embraced a definition of marriage as a social and public, not private, institution, thereby placing it beyond the scope of federal regulation. This had the effect of maintaining sexual relationships between blacks and whites in the nonobligatory sphere, segregated still from economic entitlements and property rights then accruing to black relationships recognized as "marriages." Recognizing the economic effects of this, black legislators in the Reconstruction Congress pushed to eliminate antimiscegenation laws, arguing that they maintained black concubinage.<sup>200</sup> Of course, such legislation did not, could not, succeed. As Mary Frances Berry notes: "The white men had not flouted the interracial marriage taboo. Instead, they reinforced the subordination of blacks by arranging their sexual relationships with African-American women in whatever fashion they desired."<sup>201</sup> In the postbellum era, black men would have material obligations stemming from sexual relationships with black women; white men still would not.

Finally, the *Honey v. Clark* decision exposed the vulnerability of a system that was attempting to authorize the ability of blacks to make property claims stemming from companionate relationships, and simultaneously attempting to protect white wealth and succession chains. Statutory or constitutional language that ratified relationships which were previously denied marital recognition by virtue of bondage could be interpreted broadly or narrowly. *Honey* adopted the broader interpretation, ignoring, or perhaps endorsing, the racial implications for property. The decision offers a stunning example of the judicial reasoning on race and property characteristic of the Reconstruction courts, as Mary Frances Berry has noted.<sup>202</sup> *Clements v.*

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200. Emily Van Tassel describes efforts in Mississippi, Louisiana, and Arkansas, including one call for the death penalty for white men who cohabited with black women. See Van Tassel, *supra* note 15, at 901.

201. Berry, *supra* note 46, at 854 (noting that, for the most part, Reconstruction judges upheld the interracial arrangements).

202. See generally Berry, *supra* note 46, at 854.

Crawford almost immediately closed the rupture opened by *Honey*, reconstituting the antebellum norms of race, property, and sexuality in the succession of property.

As the awful consequences of slavery began to show in the poorhouses and on the roads to the north, in *Honey v. Clark* and *Stikes v. Swanson*, Reconstruction-era judges attempted to cleanse the legal system of the logic of slavery. They went further than merely articulating rules protecting black relationships to property. They rejected and cast aspersions upon the *racial supremacy* that had underpinned slave law. However, within half a decade of each of these decisions, the logic of slavery and racial supremacy was re-inscribed. Not surprisingly, testamentary transfers also caused a series of complex negotiations in the postbellum era.

### B. Testamentary Transfers

One of the wealthiest and most influential planters in post-Civil War Georgia, David Dickson, died in 1885.<sup>203</sup> Dickson's will sparked controversy over his long-term sexual liaison with a black woman, casting the Supreme Court of Georgia, in *Smith v. DuBose*,<sup>204</sup> into the middle of an immense scandal. Like so many men of his class, Dickson had enslaved a black concubine and fathered a child by her. At his death, their daughter Amanda and her mother Julia were Dickson's only family, apart from his collateral heirs.<sup>205</sup> While Dickson's lifetime sexual habits were not in themselves transgressive, his postmortem disposition of his estate was. Dickson's will provided that his very large estate would go almost entirely to his daughter and her children, also fathered by a white man. Amanda Dickson—a former slave, black and illegitimate—stood poised to take control of one of the most valuable estates in Georgia worth half a million dollars.<sup>206</sup>

Neither Amanda nor her mother would have been entitled to Dickson's estate in the absence of a will, as the laws of illegitimacy remained in effect. Accordingly, Dickson's collateral heirs challenged the validity of the will on several counts. They alleged that the devises and bequests had been obtained through the undue influence and improper control of Amanda and her

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203. See GENOVESE, *supra* note 10, at 417-18; Van Tassel, *supra* note 15, at 919.

204. 78 Ga. 413 (1887).

205. Amanda Dickson's life story has received interesting book-length treatment. See KENT ANDERSON LESLIE, WOMAN OF COLOR, DAUGHTER OF PRIVILEGE: AMANDA AMERICA DICKSON, 1849-1893 (1995); see also Van Tassel, *supra* note 15, at 919-25 (noting that Amanda was both a child of and participant in an enslaved/master relationship).

206. The title of Kent Anderson Leslie's book, cited in note 205 *supra*, deftly captures the anomaly.

mother, Dickson's concubine;<sup>207</sup> that mother and daughter were guilty of fraud in inducing Dickson to believe he was Amanda's father; that Dickson lacked capacity to make a will; that the jury ought to be instructed that they were authorized to discount the women's credibility as witnesses if the women exhibited moral turpitude; that Julia's conduct toward Dickson during their life together was "overbearing rather than submissive";<sup>208</sup> and finally, that the postmortem transfers contemplated by Dickson violated public policy. Thus, Dickson's collateral heirs demanded that the will be declared void.<sup>209</sup> In short, they drew on the same bank of stereotypes and charges characteristic of the antebellum challenges to wills of this type.

The Supreme Court of Georgia upheld the trial court's admission of the will into probate, which the intermediate appellate court had affirmed as well. Core passages from Justice Hall's defense of the validity of the will illustrate how little had changed from the antebellum to the postbellum sexual economies.

First, the opinion stressed the primacy of the testamentary power.

Among the rights of citizens of this State . . . are the right to the acquisition and enjoyment of private property and the disposition thereof, the right to vote, hold office, etc. It is unquestionably true that a testator, by his will, may make any disposition of his property, not inconsistent with the laws or contrary to the policy of the State.<sup>210</sup>

Representing the testamentary transfer as a core component of citizenship, analogous to the exercise of fundamental political rights, mirrors the antebellum rhetoric of testamentary freedom. Thus, even with increasing pressures put on the legal system by the possibility of individual deviance without the policing of racial relations offered by slavery, the court upheld the primacy of the will.

Next, the court discussed the heirs' contentions that enforcement of the will would amount to putting judicial force behind Dickson's breach of racial and sexual norms. Justice Hall's opinion dispensed with these arguments in familiar language:

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207. Appellants argued:

[The trial court] erred in refusing to charge the following: "The influence of a lawful relation over testamentary disposition is not prohibited by law, except when unduly exercised over the very act of devising, but that of unlawful relation is naturally and ordinarily unlawful, in so far as it respects testamentary dispositions favorable to the unlawful relation and unfavorable to the lawful heirs."

*DuBose*, 78 Ga. at 424.

208. *Id.* at 425 (statement of a witness).

209. "[T]he paper was, in its scheme and nature and tendency, illegal and immoral and contrary to the policy of the State and of the law, and destructive and subversive of the interests and welfare of society." *Id.* at 427.

210. *Id.* at 434.

We know of no constitutional provision or statute or any decision of our courts, nor are we aware of any principle of the common law, which holds it to be immoral or wrong for the putative father to make provision for his illegitimate child, whether that child be white or colored; or for the illegitimate offspring of such child, whatever the complexion of such offspring may be . . . .<sup>211</sup>

Hall's opinion then elaborated the legal protection of Julia's and Amanda's rights as Dickson's sexual family.

[W]hatever rights and privileges belong to a white concubine, or to a bastard white woman and her children, under the laws of Georgia, belong also to a colored woman and her children, and that the rights of each race are controlled and governed by the same enactments or principles of law.<sup>212</sup>

Thus the language of affective obligation and family appeared to have ongoing resonance, suggesting that the code of honor remained somewhat intact. The opinion combined these ideas with a new rhetoric of racially neutral protection of rights. The court's assertions of lack of racial bias in the assignment of rights to sexual relationships preserved the appearance of the legitimacy and fairness of the legal system. Appeals to color-blind norms would of course prove crucial in the jurisprudence of race and segregation that governed until *Brown v. Board of Education*.<sup>213</sup>

Beyond the protection of family and rights, the court conducted a detailed consideration of the public policy challenges to enforcement of the will, examining how other courts had dealt with them. Justice Hall quoted at length decisions upholding contracts against public policy challenges. This turn, from a discussion of testamentary transfers as core property rights to a precedential analysis centered on the integrity of contracts, is a fascinating one. Georgia had followed the rest of the southern states in concluding that the Civil Rights Act, giving blacks the same rights to make and enforce contracts as whites, did not apply to contracts between members of the groups for marriage. In the wake of upholding the prohibition on David Dickson's and Julia's entry into a marital contract as against public policy, the Supreme Court of Georgia evoked the primacy of contract to uphold Dickson's testamentary transfer to that same sexual family.

This then demonstrates the final point to be made about the private law framework that governed the postbellum sexual economy: With interracial marriage prohibited, and ratification statutes authorizing rights only to black relationships, Julia and her child remained in much the same position vis-à-vis succession entitlements in interracial relationships as Fan and Caroline had in the antebellum economy. Law imbued them with no property rights. Courts continued to enforce testamentary transfers from white men to en-

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211. *Id.* at 441.

212. *Id.* at 434.

213. 347 U.S. 483 (1954).

slaved women. In the postbellum world, they escaped servitude, but remained concubines.

The judgments of the legal elites certainly affirmed male power and control in southern society. They may have been trying to replace the antebellum private patriarch with the state . . . or to restore the tradition and order they had known to a bruised and vulnerable South after the war . . . or to maintain racial subjugation under changed conditions . . . . Patriarchy and racial and sexual subordination were the rule in their judgments. Everyone had a role to play: White women were fragile, weak, and in need of male protection; African Americans were subjugated but legally free; white men must exhibit their power and control in the family and over race and class inferiors or risk opprobrium and punishment. Judges considered the societal effects of changed economic circumstances and the devastation of war, but the imperatives of race and class remained largely static, as did expectations concerning male and female roles regardless of race and class.<sup>214</sup>

## V. THE CURRENT SEXUAL ECONOMY

This article has attempted to cast new light on old doctrine—marriage, property, and contract. I hope that in the process it has exposed the effects of the allocation of economic rights on sexual relationships. Clearly, these two themes, private law and the economic regulation of sexuality, have contemporary implications. While I leave to others the development of a more detailed picture of the American sexual economy at the turn of this century, I would like to sketch some of the ruptures and continuities that I see between the nineteenth- and late twentieth-century sexual economies.

I hesitate to suggest that in our era there would be a unitary sexual economy, as opposed to the varying ones of the nineteenth century. On the other hand, in this article, I stressed sexual economy distinctive to the political economy of southern slavery. Cultural studies and other scholars might make compelling arguments that there remain multiple sexual economies in the United States today, despite the appearance of a single political economy.

First, this article highlighted the effects of private law doctrine in enabling or suppressing economic personality. What emerged in the case studies of both intestacy doctrine and testamentary transfers was the critical distinction between property rights and relinquishment, economic capacity and charity. How wealth is transferred, via right or beneficence, proves significant in marking a group's location in our culture. One can certainly see the distinction in the welfare debates and in efforts to stigmatize AFDC and related aid while preserving social security as a "right."

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214. Berry, *supra* note 46, at 837-38. Emily Van Tassel similarly speculates that the purpose of antimiscegenation legislation after the war was to maintain racial hierarchy and that notions of securing racial purity became important only in the twentieth century. See Van Tassel, *supra* note 15, at 901.

Second, the case studies demonstrate how law enabled and suppressed economic personality specifically in the context of the family. In so doing, I join the ongoing assault against efforts to relegate sexuality to a "private sphere," disconnected from market or political relations. Far from being a segregated sphere of life, the intimate sphere of sexual relations is a primary one in which economic rights are allocated.

A related point is the intertwined nature of economic, political, and sexual personalities. This is not only true for blacks. Sexual families headed by gay and lesbian couples still do not receive the economic and property rights that accrue to sexual majorities. I hope this article has made clear that the suppression of economic personality is intricately connected to the denial of political personality and citizenship. In fact, economic discrimination in the family sphere may be viewed as a key manifestation of political marginalization and social subordination.

I do not mean to suggest that the sexual histories of blacks and sexual minorities are the same. Slave law and culture brutally severed the affective *and* economic bonds of family life; the wholesale ownership of human flesh entailed almost unimaginable violence to maintain the daily exploitation. However, there is a critical and fundamental analogy to be drawn, in that state regulation of sexuality has been used to persecute both black Americans and sexual minorities, and denials of economic personality have been a core way of doing so.

Nor do I mean to suggest that the denial of black economic personality in the intimate sphere is completely in the past. Black Americans continue to experience sexual policing through economic regulation in areas such as current welfare reform. Economic personality stands with political personality as an emblem of citizenship and personal sovereignty. Those advocating for civil rights must be attentive to the repression of economic personality by private law mechanisms, even as we are attuned to voting rights, criminal process, and education.

Clearly, throughout my analysis, marriage looms large as a primary axis along which economic personality is determined. Even as this article has attempted a sexual legal history of slavery, I wish to call for racial legal histories of marriage. As I described in Part IV, after Emancipation, blacks viewed marriage as a highly political institution, a marker of full citizenship. Yet the media and politicians castigate current choices made by many blacks to abstain from the institution. Given the cultural furor, legal scholars could offer much needed information about the history of marriage as a racially exclusionary institution. Such an analysis might reveal insights into current ambivalence many blacks appear to feel for the institution. It might also suggest continuities with gay and lesbian debates about whether to pursue the availability of same-sex marriage.

Finally, analyzing the economic relationships that arise in the sexual sphere calls attention to the material contexts that influence desire. In Part III, I concluded that the wills authored by the testators need not be indicative of what we might today call "love." In fact, the mechanics of wills meant that they may have offered yet one more tool for securing the erotics of submission and the romance of domination between the testators and their concubines. This last point is a difficult one. I feel compelled to mention it, as women students typically raise it when I discuss these case studies with them. They see continuities between the disturbing erotics of the antebellum sexual economy and their own lives. Thus, the notion of a sexual economy in which economic and sexual relations are intimately connected may cast light on the ongoing hunt for that elusive notion: the true nature of desire.

## CONCLUSION

I have described how the private law rules of marriage, legitimacy, contract, and succession played out (quite poignantly in many cases) in instances of both testate and intestate succession. In the southern states, efforts to re-define succession doctrine to reflect American norms of family, wealth, and property rights were complicated by slavery. The question for the South was, would it substitute the perpetuation of racial wealth for the feudalistic preference for dynastic wealth?

A tiny subset of the already small portion of those manumitted garnered wealth sufficient to encourage them to make claims upon the legal system to enforce the transmission of property within lines they defined as family. While numerically insignificant, these cases posed real tensions for southern ideology. In them, emancipated blacks rejected their denomination by law as solely commodities, seeking instead to establish relationships to property, and thereby to enter the market sphere. Such cases required southern courts to articulate a series of succession rules that would be consistent with both the hierarchies of slavery and the norms of conjugal and lineal wealth transfer.

Judges turned to the logic of legal formalism to negotiate these contradictory imperatives. Courts construed enslavement as a defining, dispositive status that governed the assignment of rights, even after Emancipation.

Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner.<sup>215</sup>

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215. *Malinda & Sarah v. Gardner*, 24 Ala. 719, 723-24 (1854).

Marriage and slavery were classified as mutually exclusive legal relationships, as "fanciful conceit[s]" in the strongest articulation of the marriage-as-contract rule in *Howard v. Howard*.<sup>216</sup>

The distributive rules of succession doctrine in these cases reinforced the exploitative roles of enslaved women in the sexual economy. The reproduction of the enslaved could never produce property rights, only property. Sexual relationships never yielded economic rights, regardless of the degree of affect, length of commitment, or adherence to monogamy. Southern succession doctrine blocked the intimate sphere, as well as the commercial, as a source of economic personality for the enslaved.

Many of the other case studies involved potential wealth transfers from white men to their black concubines. Most of the popular accounts of such transfers have portrayed them as the triumphs of romance over social disapproval, and indeed the real love and affection that may sometimes have grown up between master and slave have their place in the story of slavery. But these stories—and the legal rules that surrounded them—offer an altogether different set of messages about law, ideology, legal history, and even about contemporary debates over such issues as formal equality and gay marriage.<sup>217</sup>

For those interested in the social function, ideological messages, and relative autonomy of the law, these cases present a fascinating set of tensions. Both before and after slavery, southern courts dealing with the wills of white men who tried to leave property to their black concubines were faced with a series of apparently insoluble ideological conflicts. The legal consciousness of the nineteenth century set great store on the power of the sovereign rights-holder to dispose of his property, at the same time that it was built around a series of racial hierarchies—explicit and formal during the antebellum period, implicit and substantive during the postbellum period. What is to be done when the ideal of the sovereign property-holder apparently conflicts with the racial hierarchies around which the law is built? The language of the trial court in *Smith v. Dubose* is particularly instructive:

Every man in this State has a right to will property to whom he pleases. There is no policy of the State which would make it unlawful or contrary to such policy for a man to will his property to a colored person, to any bastard or to his own bastard, and such considerations as these would not alone authorize a will to be set aside . . .<sup>218</sup>

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216. 51 N.C. (6 Jones) 235, 239 (1858).

217. See, e.g., Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) (using anti-miscegenation doctrine to illustrate invidious harm purpose of sodomy laws); Franke, *supra* note 46 (drawing analogies between postbellum treatment of enslaved marriages and contemporary debates over classifications of gay relationships).

218. *Smith v. DuBose*, 78 Ga. 413, 430 (1887) (quoting the trial court, quoting appellants' motion for a new trial).

On top of the conflict between the ideologies of property and of race, lies another set of conflicts about race, sexuality, and gender roles. As Mary Boykin Chestnut pointed out, the southern ideals of the chivalrous white gentleman and his pure and ladylike bride were built over a system that allowed unrestricted access to the bodies of black women.

God forgive us, but ours is a *monstrous* system and wrong and iniquity.... Like the patriarchs of old our men live all in one house with their wives and their concubines, and the mulattoes one sees in every family exactly resemble the white children—and every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds ....

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.... A magnate who runs a hideous black harem and its consequences under the same roof with his lovely white wife and his beautiful and accomplished daughters? He holds his head as high and poses as a model of all human virtues to these poor women whom God and the laws have given him....<sup>219</sup>

How were the realities of such a sexual economy to be reconciled with its ideals of white chivalry and feminine purity, and also with the fact of white men who went so far as to leave some portion of their estates to their black families? Didn't these men unforgivably breach the antebellum norm that cast as the production of commodities the reproduction by enslaved women?

The white families who opposed such wills claimed that the very fact of living openly with and leaving property to a (barbaric) black woman showed that the testator must be insane—who could be in love with such a creature? As one party opposed to such a will asserted: “The deceased is aged, infirm, and credulous; he is in the hands of a woman who has indeed ‘taken possession of him, and subdued him to her purpose.’”<sup>220</sup> At the same time, black women were portrayed as succubi, irresistible seductresses whose animal nature was capable of warping the judgment of the white men who wished to recognize them in their wills. The double identity of the black woman—both hideously barbaric and animalistically irresistible, both capital and labor—is a continuing feature of these stories.

These tensions exist on more than one level. The ideal of the sovereign property holder cannot be reduced to the ideal of the chivalrous southern gentleman, still less to that of the master of the plantation. But the private law of testate and intestate succession had to mediate all of these tensions to appear legitimate in the society in which it was embedded. There is something almost elegant in the way that the probate courts ordered the admission of the wills into probate, issuing strong condemnation of the testators’ sexual conduct, and yet offering guarded approval of the charity that both the testa-

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219. Mary Boykin Chesnut journal entries of March 18 and August 26, 1861, in MARY CHESNUT'S CIVIL WAR 29, 168 (C. Vann Woodward ed., 1981).

220. Davis v. Calvert, 5 G. & J. 269, 283 (Md. 1833) (quoting 1 Cox's Ch. Cas. 354).

tors and the law are displaying. The testators' miscegenetic practices are thus described as exception rather than norm, while judicial deference to the testators' wishes, in the face of social misconduct, reinforces the message that the legal system respects the power of the sovereign property holder. Finally, as I pointed out earlier, the feelings that gave rise to the testamentary transfers are demoted into a proto-ethical set of "natural sentiments," laudable in their way, but reflective of altruism rooted in animal sympathy rather than ethical duty rooted in human law. The delicate minuet that the law traces out in these cases recalls the much-quoted words of E.P. Thompson:

[I] found that law did not keep politely to a "level" but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.<sup>221</sup>

These points lead me to my larger interest, the focus on the private, rather than the public, law of race and sex. As noted at the beginning of this article, criminal prohibitions on interracial marriage fit easily into both the popular and the legal literature on race and law in America. It is easiest for us to be upset by the statute struck down in *Loving v. Virginia*,<sup>222</sup> in part because it presents us with the ultimate violation of liberal political morality—a state enforced negation of the principle of choice, in the most private sphere of all, the choice of a lover and a mate. Contemporary political activism around the issue of gay marriage often focuses on this fact, in part because of the contours of current constitutional doctrine and in part because these claims are the easiest to make within the language of liberal legalism. These two points are, of course, connected.

Racial legal histories of marriage and sexual legal histories of slavery will enable us to rethink contemporary social meanings of marriage and interracial sex, while close attention to both distributional effects and the ideological messages of the private law of marriage and testamentary transfer may help to enrich current debates about gay marriage—the relationship, that as the Supreme Court of North Carolina said in *State v. Hairston*,<sup>223</sup> is more than merely a contract.<sup>224</sup>

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221. E.P. THOMPSON, *The Poverty of Theory or an Orrery of Errors*, THE POVERTY OF THEORY AND OTHER ESSAYS 1, 96 (1978).

222. 388 U.S. 1 (1967).

223. 63 N.C. 451 (1869).

224. See *id.* at 453.

The claim of this article is that the ideological messages and distributional consequences of private law are at least as important—if not more important—than the public law criminalization of a particular kind of relationship. The law decides what relationships to recognize and not to recognize, and which to clothe with legal significance. It deals with privileges and powers as well as with prohibitions and sanctions. People live their lives in the social landscape thus constructed; in this sense we are all living in the shadow of the law.